PROPOSALS TO CRIMINALIZE THE UNAUTHORIZED DISCLOSURE OF THE IDENTITIES OF UNDERCOVER UNITED STATES INTELLIGENCE OFFICERS AND AGENTS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON LEGISLATION

OF THE

PERMANENT SELECT COMMITTEE ON INTELLIGENCE HOUSE OF REPRESENTATIVES

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PROPOSALS TO CRIMINALIZE THE UNAUTHORIZED DISCLOSURE OF THE IDENTITIES OF UNDERCOVER UNITED STATES INTELLIGENCE OFFICERS AND AGENTS

WEDNESDAY, JANUARY 30, 1980

U.S. HOUSE OF REPRESENTATIVES,
PERMANENT SELECT COMMITTEE ON INTELLIGENCE,
SUBCOMMITTEE ON LEGISLATION,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:04 a.m., in room H-405, the Capitol, Hon. Romano L. Mazzoli presiding.

Present: Representatives Mazzoli, Fowler, Boland (chairman of the full committee), McClory, Whitehurst, and Young.

Also present: Thomas K. Latimer, staff director; Michael J. O'Neil, chief counsel; Patrick G. Long, associate counsel; Bernard Raimo, Jr. and Ira H. Goldman, counsel; Annette H. Smiley and Herbert Romerstein, professional staff members; and Louise Dreuth and Diane Kennedy, secretaries.

Mr. MAZZOLI. The subcommittee will please come to order.

We have the pleasure of having with us the chairman of our full committee, the gentleman from Massachusetts, Mr. Boland, who has a statement.

The gentleman from Massachusetts.

Mr. BOLAND. Thank you, Mr. Chairman.

First of all I want to welcome all of you here this morning to what I am sure will be interesting hearings, today and tomorrow.

In the past several years, the intelligence activities of the U.S. Government have been exposed to the light of public scrutiny to a degree never before witnessed in this or any other country.

Presidential commissions, congressional committees, judicial decisions, investigative reporters, have all, at one time or another, given us a detailed glimpse of the day-to-day practices of our intelligence agencies.

To an unfortunate degree, some of these practices were found wanting, wanting in terms of their compatibility with American values, morals, laws and constitutional precepts. We have now, I believe, taken the painful but necessary steps to bring to a halt such practices and to insure that they do not occur again.

All of this has not been done without rancor, divisiveness, and heated debate among our people and within the Government.

Significantly, however, both sides of the debate have always proceeded on the unquestioned assumption that it is both necessary and proper for this country to possess a clandestine intelligence service.

The simple and obvious fact is that a clandestine service cannot function if the identities of its undercover officers and agents are con-

tinually being subjected to the public gaze. And this, we are told, is exactly what is happening today.

No matter how hard I may try, I cannot come up with a sensible political, moral, or legal reason for American citizens to intentionally disclose the names of this country's undercover agents. The only arguably acceptable reason I can come up with, disclosure of abuses or illegal activity, does not seem to be in the minds of those who publish whole lists of names of alleged agents, with no reference at all to any possible illegal actions. Furthermore, we have now established honest and responsive mechanisms such as the congressional intelligence committees, to look into charges of intelligence agency abuses.

We are thus left in the position, I believe, where a criminal statute is necessary. The bill under discussion today, H.R. 5615, is offered by this committee as a narrowly focused and effective solution to the disclosure problem.

I recognize that some of its provisions are controversial and touch on first amendment questions. Neither I, nor I am sure, the other members, are wedded to every section, and I look forward to an open and frank discussion of the sensitive constitutional and legal issues involved.

I fully expect that our final product will demonstrate that an effective intelligence collection capability is compatible with the values upon which our democratic society is based. That is the thrust of the Intelligence Identities Protection Act.

Thank you, Mr. Chairman.

Mr. MAZZOLI. I thank the gentleman from Massachusetts, our chairman.

And does the gentleman from Illinois, the ranking member, have a statement?

Mr. MCCLORY. Yes, Mr. Chairman, thank you very much. I want to applaud the chairman in calling this hearing which I strongly support. The identities of CIA intelligence officers and agents must be kept secret, and legislation to protect this secrecy, it seems to me, is extremely important. In other words, we must not only protect the intelligence collection capabilities of our Nation, but also the livelihoods, and in some instances the very lives of those who are involved clandestinely in securing information vital to our Nation's security interests.

The damage to our security caused by misguided disclosures is clear and the jeopardy to the safety of the individuals involved is clear. What is not so clear, however, is the horrible impact this has on the people who are involved.

Mr. Chairman, consider, for instance, a CIA case officer. First he spends months training, away from his family, sometimes in language study, and he has physical, intellectual and emotional demands placed upon him. In many cases he is sent off to a faraway country to perform services vital to our national interests. On top of all this, the CIA officer must hide his or her true work from his friends and relatives, even from his own children.

This often goes on not for a matter of years, but for many, many years; in some instances, even after a person retires, he must maintain his secrecy about his service in the CIA.

Think of the impact that the wholesale disclosure of secret identities has on the lives of these people. Consider also the patriotic American businessman or woman who engages in international transactions. While wanting to assist our foreign intelligence effort, he or she is fearful of losing an entire business if word of cooperation with the CIA comes out.

How can we ask for such cooperation unless we are willing to lessen the chances of disclosure? And without being able to call on those Americans who have significant foreign contacts, our country is truly hurt.

For these reasons, too, congressional action is sorely needed.

Mr. Chairman, I am very happy to join in the support as a cosponsor of this legislation which has strong bipartisan support. It seems to me that this is a piece of legislation which needs prompt action, and I am happy that we have been able to call early hearings on the measure.

Thank you, Mr. Chairman.

Mr. MAZZOLI. I thank the gentleman from Illinois, and I would recognize the gentleman from Georgia, a valuable member of our committee.

Mr. FOWLER. It has been pretty much covered, Mr. Chairman, except to say that this is one of the most important issues that we have addressed, attempting to balance our Nation's security needs and protecting individual liberties.

There is no question that the continued exposure of our undercover agents operating in the service of this country is a threat to our national security. At the same time, when we talk about putting people in jail for releasing unclassified information, we have to tread very carefully in legislative waters.

I believe, as we did last year with the Foreign Intelligence Surveillance Act, that we will be able to balance these ofttimes competing ends, and I look forward to the expert testimony of our witnesses, and appreciate the bipartisanship with which the bill has been drafted, and hope that we will be able to perform this function.

Mr. MAZZOLI. I thank the gentleman from Georgia.

The gentleman from Kentucky, the acting chairman of the committee today, has a statement, but in deference to the time constraints of the gentleman from Texas, our first witness, the acting chairman will defer stating that opening statement.

I would at this point, though, like to mention that—and I am sure all of my colleagues join me in expressing best wishes to the permanent chairman of our subcommittee, Morgan Murphy, the gentleman from Illinois, who is ill and unable to be with us today, but whose leadership on the committee and on this particular issue has been on the record for a long time.

We are honored today to welcome to our committee our first witness, Hon. Jim Wright of Texas, the distinguished majority leader of the House of Representatives.

Mr. Wright is the chief sponsor of H.R. 3357, which is one of several bills before the committee. Mr. Wright's bill seeks to protect the identities of undercover CIA agents and officers. Majority Leader Wright has been among the earliest and most persuasive forces in

the House urging legislative protection for undercover intelligence personnel.

We appreciate your being here today, Mr. Majority Leader. You can proceed as you wish, to summarize, to state your case, and to get back to the important business of majority leadership.

STATEMENT OF HON. JAMES C. WRIGHT, JR., A REPRESENTATIVE IN CONGRESS FROM THE 12TH CONGRESSIONAL DISTRICT OF THE STATE OF TEXAS

Mr. WRIGHT. Thank you very much, Mr. Chairman.

I regard this particular bill as a significant part of the important business of the majority leader's job, just as it is a significant part of the congressional agenda.

I want to congratulate you, first of all, upon the initiative you have demonstrated in calling these hearings. I hope they will result in the prompt presentation of a bill to the House so that we might pass it.

I want to appear here today to underline and to stress the importance which we attach to President Carter's request for a revitalization of the CIA and our Nation's intelligence-gathering apparatus. I think we all recognize that for several years now we have been undergoing an orgy of self-recrimination, even self-flagellation.

It has become chic in some quarters to disparage and to belittle the CIA. But to make the Nation's intelligence apparatus the object of scorn is damaging.

It is bad because of the deleterious effect that it exercises upon the morale of those who must perform this delicate, dangerous and difficult task for the United States. And I have been told in conversations with members of that Agency and with agents that it has had a very bad effect upon morale and that many of them now look forward only to retirement. They have lost their zest simply because they haven't been able to feel that the public, that the United States appreciated their efforts or was behind them.

But worse is being done than that, of course, and it is the worst that these bills attempt to approach. Some zealots have carried their hatred for the CIA one dangerous step further. They have taken it upon themselves to expose the identity of American CIA agents throughout the world, thus endangering their lives and deliberately drying up their intelligence sources.

The prime example, of course, is the former CIA agent become rogue, a man named Philip Agee, who along with associates has been publishing a magazine with the stated purpose of exposing CIA agents and operations whenever and wherever they are found. Now, that is just an absolute outrage. It is unthinkable that a nation would tolerate this kind of depredation, willfully committed against those whom it entrusts to carry out so delicate and difficult a mission for the people, for the country.

That kind of practice, of course, needs to be stopped. And it was with that in mind that I, along with other Members of the House and of the Senate, last year introduced proposed legislation to outlaw that kind of activity.

Now, the bill that I introduced, in conjunction with Senator Bentsen of my State, would make it a crime punishable in Federal courts by up to a $10,000 fine and 10 years in jail for any person such as Agee publicly to disclose information which could endanger the lives of Americans engaged in the difficult, dangerous task of gathering essential information for this country.

Now, that bill of mine is certainly not the last word, and I know that the committee will perfect and improve that language and probably will add other provisions to whatever legislation comes out of this committee.

But I should like to stress that the bill which I and others introduced doesn't interfere in any way with press freedom. Its penalties would apply only to those who have come into authorized possession of specific information and then decide on their own to betray their oaths of office and to betray their former colleagues, and indeed, to betray their country.

I think the comments of Judge Gessell, in ruling negatively upon the power of the Secretary of State to deny a passport to this man Agee, was significant in that he suggested that the response of the Secretary of State might be likened unto using a fly swatter when in reality it seemed to him—a judge not known in any means for being insensitive to civil rights— that the appropriate action might be a charge of treason. And so it seems to me.

The mortal danger to our Nation's personnel abroad is not just theoretical. We all know, of course, that in 1975 CIA Athens station chief Richard Welch was murdered shortly after a magazine article listed him as a CIA agent.

That, in turn, has had another effect which I am sure can be addressed much more knowledgeably by the witnesses who are here today to speak for the Agency. It has poisoned the wells from which our agents have drawn vital information in the past. It has become much harder, I am told, to get foreign sources to cooperate with us. The feeling seems to be that if we can't protect our own, well, we darned well can't protect them, or won't. And so they have quit dealing with people who are involved in our intelligence-gathering operation.

If the identity of our intelligence agents is publicly known, then obviously those who would be their contacts abroad are going to be extremely wary of passing information to them or being seen in their presence, and their value as agents is largely destroyed.

Of course, I am not talking of permitting the CIA to break the law. That isn't even involved in this legislation. CIA personnel, just like all other Americans, like members of the FBI, Members of Congress, the President, and everybody else, must observe the law. There's nobody in this Nation who is above the law. But we do live in a real world, and it is sometimes a dangerous world, and some of this world's inhabitants plot and intrigue against us, against our Nation and our welfare. Certainly it is in our interest to know of their intrigues and to blunt their plots, and so we need to have a professional capacity to anticipate what is likely to happen in remote parts of the world.

Of course, we were surprised, as were many people throughout the world, at the forces which brought about the collapse of the

Government of Iran, and that is very much on our minds in these days of trouble in the Persian Gulf. We can only speculate as to the danger and jeopardy in which the world peace and our national interests would be put if something similar to that, God forbid, were to occur in Saudi Arabia.

To avoid such surprises in the future and to cushion our Nation from their effects is the very work of our intelligence agencies, and it is legitimate work. We need to respect it and we need to protect those who perform it for us.

And I believe that there would be overwhelming and enthusiastic approval in the Congress and throughout the Nation, and a salutary effect throughout the world, if we act expeditiously and affirmatively on this legislation.

Mr. MAZZOLI. I certainly thank the majority leader for his thoughtful statement, and I would ask my colleagues, because of time constraints, to limit our questions to the 5-minute rule, and that includes the acting chairman.

Mr. Wright, you mentioned early in your statement that this bill seems to be on the agenda for the Congress for the second session of the 96th Congress. Can I take that to mean that this is one of the priority items on that agenda, and the Democratic leadership and the White House are committed to the achievement of some kind of a bill like this in this session?

Mr. WRIGHT. Mr. Chairman, I most emphatically would answer in the affirmative. Yes, this is a priority item. It is one of the few things that the President of the United States asked us to do, to revitalize the CIA and our intelligence-gathering apparatus. I don't know of any better way to do it than through this bill. I don't mean to suggest that this is the only thing we need to do in that direction, but it is a good first step, and yes, if this committee reports the bill, we in the leadership will certainly be responsive to the requests of those handling the bill on behalf of this committee for early scheduling. We will make it a priority item.

Mr. MAZZOLI. Thank you.

I would follow that up with one thing, Mr. Majority Leader. This bill is controversial, and despite the effort of this subcommittee and the full committee, the end product will probably be controversial. It will not please one side nor the other entirely.

Is the gentleman from Texas willing to suggest that he will put his forensic powers to work as well as his nose-counting powers to work in order to find a balanced approach to this significant issue?

Mr. WRIGHT. Mr. Chairman, I trust the judgment of the members of this committee and I think you could be reasonably well assured that the leadership would give its support to the product of this committee. Of course, everything in this world is controversial. I suppose we could find some controversy to almost any conclusion we would want to state here today. But that, after all, is the warp and woof of the Congress. That is our business and we shouldn't shrink from it.

Perhaps it is controversial. There may be some who don't feel that we should have any intelligence-gathering apparatus. But I think those people are few, and I am satisfied they do not speak for the American public.

Certainly there are legitimate concerns with regard to constitutional rights, free speech, but I don't believe that free speech extends to the right to put in jeopardy the life of somebody who is serving the United States in a very dangerous task any more than it would extend to the right of someone to divulge American troop movements in time of war. I think constitutional rights are pretty well understood in that regard, and I don't believe that the abuse of freedom is necessary to its maintenance.

Mr. MAZZOLI. Thank you, Mr. Majority Leader.

The Chair's time has expired. The Chair recognizes the gentleman from Massachusetts, Mr. Boland.

Mr. BOLAND. Mr. Wright, I think there is no question about the fact that there is general agreement that legislation in this area must be strictly limited to protecting what is in fact secret, and what is in fact damaging to the national security.

Your bill and the bill that Senator Bentsen, your colleague from Texas, has introduced, I think is drawn in that fashion, in that manner, in that narrow a way, is it not?

Mr. WRIGHT. Yes; it was our attempt to draw it so. I don't have any pride of authorship. I shall not quarrel with the chairman or with the committee about the words that are used in drafting the legislation. Yes, Senator Bentsen and I made an earnest attempt to draw the legislation with some specificity, so as to protect and respect all constitutional rights of all Americans, but expressly to define as a federally punishable crime the disclosure of information to which a person had gained authorized access, and then in violation of his oath to his country and in derogation of the rights of those Americans who faithfully continue to serve the country, sought to use it to expose them and place their lives in jeopardy, and to put in jeopardy, indeed, the Nation's capacity to gather vital information.

Now, we tried to draw it carefully, but I have no doubt that the committee can improve upon it.

Mr. BOLAND. Your bill is a little narrower than the committee bill and also a little narrower than some of the other proposals that have been presented to the committee.

Your bill would target on those who had authorized access to classified information containing the identity of undercover agents and then disclose the identity without authority. The committee bill targets in on anyone, anyone who discloses it with specific intent to impair or impede the foreign intelligence activities of the United States.

What do you think of the committee bill vis-a-vis your own?

Mr. WRIGHT. Mr. Chairman, I would have no difficulty whatever in wholeheartedly supporting the language you have just described as contained in the committee bill.

Mr. BOLAND. Thank you very much, Mr. Wright.

Thank you, Mr. Chairman.

Mr. MAZZOLI. I thank the gentleman.

The gentleman from Illinois, Mr. McClory, is recognized.

Mr. MCCLORY. Well, thank you very much, Mr. Chairman.

I am very pleased to know about the new directions of the President with regard to the intelligence agencies, his present desire to revitalize the CIA and other intelligence agencies, because previously

he ordered the elimination of 820 positions, clandestine service cutbacks, in the CIA, and those jobs were eliminated as a result of his direction.

Also in the last Congress we enacted the so-called Foreign Intelligence Surveillance Act, which limits and restricts the CIA in its intelligence-gathering capability by requiring that with regard to the securing by electronic surveillance of foreign intelligence, they must go to a special court and get a court order before we are even permitted to secure intelligence in this way, notwithstanding that the foreign agents can secure intelligence against us through such means.

The question that occurs to me is this: I understand that the present Hughes-Ryan Act is more limiting and more restricting with regard to securing the cooperation of foreign intelligence agents to help us, or even the willingness of some of our present intelligence agents to secure information for us, and yet the President is not, as I understand it, supporting enactment of revision of the Hughes-Ryan Act except in the context of a so-called intelligence charter. But the charter bill would further hamstring the intelligence agencies and would not liberate it from the restraints that are presently on it.

I am really perplexed. I hope, and I believe from the President's state of the Union message that he is moving in new directions with regard to our national security militarily. But even more imporantly, I think our intelligence capability is more important to our national security than even our military. And I assume that what you are telling us today is that the President is in strong support of this and that he will also give support to other measures which would strengthen our intelligence capabilities.

Do I understand you correctly?

Mr. WRIGHT. Mr. McClory, I don't have any credentials to speak for the President. I am sure he can speak for himself and his appointees can——

Mr. MCCLORY. But you mentioned President Carter's demand for revitalizing our intelligence agencies.

Mr. WRIGHT. I think the gentleman was there the same night I was and heard the same speech.

Now, I think the very last thing we would want to do, Bob, would be to turn this into a forum of partisan disagreement.

Mr. MCCLORY. Well, you mentioned the President and you mentioned his support of revitalizing the intelligence agencies.

Mr. WRIGHT. Yes; I think this is one way to do it.

Mr. MCCLORY. And he supports this measure? You assume that he supports this one?

Mr. WRIGHT. I do assume that he supports this measure. I support this measure, and I am here to speak for Jim Wright, and I am here to speak for what I perceive to be the will of the majority in the Congress of the United States and their desire that we have legislation of this type on which to act.

I would say this, if I may, concerning President Carter. One of the first things he said to some of us in the leadership, in the very early weeks of his Presidency, at one of our meetings, was to express his great concern over leaks that had occurred in vital stategic information, and to request the creation of one committee of the Congress to

whom these intelligence agencies might report rather than having such a proliferation of committees with multiple opportunities for leaked information. That was one of the first things he asked us to do.

Mr. McCLORY. He has expressed his support for that?

Mr. WRIGHT. Well, he did very early on, almost 3 years ago.

Mr. McCLORY. Don't you think we could consider that as separate legislation without tying it in to the charter legislation which would further hamstring it?

Mr. WRIGHT. As a matter of fact, it was in response to that suggestion that this committee was created in 1977. So the President has not been lacking in a sincere interest in protecting the integrity of the information to which the intelligence agencies are privy, nor in asking the Congress to support this kind of legislation.

Mr. MAZZOLI. The gentleman's time has expired.

The gentleman from Georgia is recognized.

Mr. BOLAND. We indicated it would be a little controversial.

Mr. FOWLER. Well, not to debate my distinguished colleague from Illinois at this time, but I do think that it ought to be said as we begin these hearings that, in echoing the excellent presentation of the majority leader, obviously this committee will be considering numerous pieces of legislation that have been offered by both bodies, which deal in strengthening the capability of our intelligence-gathering apparatus, and that all the missiles in the world and all the defense expenditures in the world are not sufficient security protection if we have decimated our early warning system by what we have done to our intelligence-gathering apparatus.

I believe that this committee and the similar committee in the other body, in considering any legislation surrounding Hughes-Ryan, any legislation in rewriting the charter, the graymail legislation that we marked up yesterday to enable use to proceed judicially in areas of classified information, and this legislation, that we are all trying to get off this pendulum effect of the last decade where we swing away, swing to one side of total restrictions on our intelligence-gathering apparatus, to a call from some quarters to remove every restriction and almost eliminate any oversight, which could have as ill-advised an effect as the other swing of the pendulum.

And I think that, again, we will be able to balance in the national interest these competing interests to accomplish both purposes. And I want to thank the majority leader for his mental prowess as well as his well-known forensic and persuasive prowess.

Mr. WRIGHT. The gentleman has just perjured himself.

Mr. McCLORY. Would the gentleman yield?

Mr. FOWLER. I am trying to make it through the whole 5 minutes before the famous, the well-known McClory-Fowler debates begin.

I yield to the gentleman from Illinois.

Mr. McCLORY. I just wanted to ask if you would include in the strengthening of the intelligence capability the elimination of the requirement to report to eight separate committees of the Congress, over 180 members plus the staffs, as an important way of securing better and more information without the danger of leaks to which you made reference?

Mr. FOWLER. I would be happy to associate myself with that.

Mr. BOLAND. And so does the President, of course. He has time and again indicated that that is his position.

Mr. MAZZOLI. The gentleman's time has expired.

There is another gentleman with us today, a valuable member of our committee, though not a member of this subcommittee, the gentleman from Virginia, Mr. Whitehurst.

If he wishes to ask a question within the 5-minute rule?

Mr. WHITEHURST. Only to say that I am delighted to be here and pleased to see this committee take this action. I am delighted to have the great persuasive powers of the majority leader on our side on this.

Mr. MAZZOLI. Mr. Majority Leader, thank you very much for your time.

Mr. WRIGHT. Mr. Chairman, thank you, and good luck to you.

Mr. MAZZOLI. Thank you.

I think the gentleman, the acting chairman, will now exercise his prerogative in making the opening statement.

The Subcommittee on Legislation meets today to receive testimony on legislation which has been drafted to address a particularly disturbing current practice, and that is the deliberate disclosure of the names of undercover U.S. intelligence officers and agents.

Such disclosures have been on the increase in recent years and are coming at a time when an effective intelligence collection capability is as necessary to the safety, security, and well-being of our Nation as never before in our history. It goes without saying that divulging the identity of intelligence agents serves to destroy this capability. Not only are lives threatened, but legitimate intelligence collection activities are rendered useless, the careers of dedicated intelligence officers are ruined, service morale is lowered, foreign policy is disrupted, and the taxpayers' money is wasted.

Some of the individuals who publicly identify undercover intelligence personnel claim to be guided by patriotic impulses and a desire to end the illegal activities committed by the intelligence services. I cannot judge their claimed patriotism nor their claimed altruism.

But I can state without equivocation that they are dead wrong; I can state that their actions damage our Nation's legitimate national security interests, and I can state that they are endangering the lives of their fellow Americans.

While there are statutes on the books which deal with the subject of unauthorized disclosures of sensitive and classified information, I am persuaded that clear, specific, and effective legislation must be crafted by this Congress to stem the rampant, intentional disclosures of the identities of undercover intelligence agents.

Now, I believe the bill before us today, H.R. 5615, which has been cosponsored by every member of this subcommittee, is a positive first step in developing such a piece of legislation.

I am not unmindful, as has already been stated this morning, I am not unmindful of the constitutional requirements affecting this subject area. These hearings will assist the subcommittee, and then, I trust, the full Intelligence Committee, to report a bill which addresses the serious problem posed by unauthorized disclosure of names of agents without impinging in any way on the constitutional guarantees enjoyed by every American citizen. In the final analysis, it is precisely

these guarantees which distinguish and exemplify the American way of life and which elevate it above that afforded to any people in any other nation on the face of this Earth.

We will now proceed to the next witness whom we would invite to walk forward and join us at the witness table, the Deputy Director of Central Intelligence, Hon. Frank Carlucci, who will be joined by Mr. Fred Hitz and by Mr. Dan Silver of his staff.

As this committee knows, Ambassador Carlucci has served his country in a varied and important list of Government posts, most notably as Under Secretary of the Department of Health, Education, and Welfare, and as Ambassador to Portugal.

His frequent appearances before this committee make him no stranger whatsoever to this committee. We thank him for his past help, and we certainly welcome him today to speak to the several bills which we have before us.

Ambassador, you can proceed in whatever manner you wish. We of course have other witnesses. You may want to summarize your statement, but you are welcome to read it entirely.

We thank you and we welcome you.

STATEMENT OF HON. FRANK C. CARLUCCI, DEPUTY DIRECTOR OF CENTRAL INTELLIGENCE, ACCOMPANIED BY DANIEL SILVER, GENERAL COUNSEL, CENTRAL INTELLIGENCE AGENCY; AND FREDERICK P. HITZ, LEGISLATIVE COUNSEL

Mr. CARLUCCI. Thank you, Mr. Chairman.

I want to thank you and the other distinguished members of this committee for the opportunity to discuss legislation which I consider to be urgently needed and vital to the future success of our country's foreign intelligence collection efforts.

I have with me today my General Counsel Daniel Silver, and my Legislative Counsel Fred Hitz, both of whom have been intimately involved in our efforts to obtain statutory protection for officers and employees of the intelligence community who serve under cover, and for our foreign agents and sources whose relationships with the intelligence community are intentionally concealed.

I start this morning from the premise that our efforts to collect information about the plans and intentions of our potential adversaries cannot be effective in a climate that condones revelation of the means by which those efforts are conducted. Indeed, the impunity with which misguided individuals can disclose our undercover officers and employees and our foreign agents and sources has had a harmful effect on human intelligence collection and other aspects of our intelligence program as well. Equally significant is the increased risk and danger such disclosures pose to the men and women who are serving the United States in difficult assignments abroad. It is outrageous that dedicated people engaged or assisting in U.S. foreign intelligence activities can be endangered by a few individuals whose avowed purpose is to destroy the effectiveness of activities and programs duly authorized by the Congress.

Mr. Chairman, recent world events have dramatically demonstrated the importance of maintaining a strong and effective intelligence ap-

paratus. The intelligence community must have both the material and human resources needed to enhance its ability to monitor the military activities of our adversaries and to provide insights into the political, economic, and social forces which will shape world affairs in the 1980's. It is particularly important that every effort be made to protect our intelligence officers and sources. It is imperative that the 96th Congress clearly and compellingly declare that the unauthorized disclosure of the identities of our intelligence officers and those allied in our efforts will no longer be tolerated.

The President has expressed his determination to increase our efforts to guard against damage to our crucial intelligence sources and our methods of collection without impairing civil and constitutional rights. Legislation in this area must be carefully drafted. It must safeguard the Nation's intelligence capabilities without impairing the rights of Americans or interfering with congressional oversight.

Attorney General Civiletti has recognized the need for identities legislation. Speaking earlier this month on intelligence and the law at Fordham University Law School, he said, and I quote:

> This is an important time to be aware that the unfinished agenda of lawmaking in intelligence includes some important items for the legitimate protection of our intelligence activities. Existing law provides inadequate protection to the men and women who serve our Nation as intelligence officers. They need and deserve better protection against those who would intentionally disclose their secret mission and jeopardize their personal safety by disclosing their identities. Public comment and criticism of intelligence activities and specific operations is proper. Revealing the identities of particular intelligence personnel and placing them in danger, on the other hand, serves no legitimate purpose. Our proper concern for individual liberties must be balanced with a concern for the safety of those who serve the Nation in difficult times and under dangerous conditions.

This committee and other Members of Congress have for some time recognized the inadequate protection to which the Attorney General referred. Representative Michel of Illinois and Senator Bentsen of Texas introduced bills to protect intelligence identities in the 94th and 95th Congresses respectively. Nine identities bills have been introduced thus far in the 96th Congress, including bills by Senator Bentsen and by Representative Charles E. Bennett of Florida, both of whom will be testifying at these hearings.

The introduction of H.R. 5615, the Intelligence Identities Protection Act, by the entire membership of the Permanent Select Committee on Intelligence last October was, of course, an extremely significant development, and an impressive demonstration of this committee's determination to maintain the effectiveness of our Nation's foreign intelligence activities.

Last week, the committee's bill was introduced in the Senate as section 4 of S. 2216, a bill cosponsored by Senators Moynihan, Jackson, Nunn, Chafee, Danforth, Wallop, and Domenici. I believe these efforts reflect a growing feeling that we, as a government, must come to grips with this problem and determine where the public interest lies. I do not believe there is any justification or excuse for the deliberate public disclosure of the identities of personnel having concealed employment or other relationships with the intelligence agencies of the U.S. Government.

The distinguished chairman of this committee eloquently expressed the essence of the problem in a recent letter to the editor of the New York Times. Chairman Boland wrote as follows:

> The operating heart of any service is the use of undercover agents and officers overseas to collect intelligence information. Obviously, if the names of these people are spread upon the public record their usefulness is ended and the effectiveness of the clandestine service is destroyed. Unauthorized disclosure of the names of undercover intelligence agents is a misguided act that serves no useful informing function whatsoever. It does not alert us to abuses; it does not bring clarity to issues of national policy; it does not enlighten public debate; and it does not contribute one iota to the goal of an educated and informed electorate. What it does do is place lives in danger and cripple our efforts to collect timely and accurate intelligence, the sina qua non for the effective conduct of foreign affairs. Whatever the motives of those engaged in such activity, the only result is the complete disruption of our legitimate intelligence collection programs, programs that bear the imprimatur of the Congress, the President, and the American people. Such a result benefits no one but our adversaries.

Mr. Chairman, those who seek to destroy the intelligence activities of the United States have propagated a number of fallacies. Unfortunately, some of these have found their way into discussions of H.R. 5615 in the press and elsewhere.

One of these fallacies is that accurate identification of CIA personnel under cover can be made merely by consulting publicly available documents—like the State Department's Biographic Register—and therefore the bill would impinge on discussion of information that is in the public domain. This is untrue. There is no official unclassified listing anywhere that identifies undercover CIA officers. The biographic register and similar documents cannot be used, without additional specialized knowledge and substantial effort, to make such identifications accurately. It is only because of the disclosure of sensitive information based on privileged access and made by faithless Government employees, such as Philip Agee and John Marks, with the purpose of damaging U.S. intelligence efforts, that the public has become aware of indicators in these documents that can, and sometimes do, distinguish CIA officers.

This, however, is not the full extent of the problem. A substantial number of the identifications made by such avowed enemies of U.S. intelligence activity, as the publishers of CovertAction Information Bulletin, have been accurate. This indicates that they are based on extensive investigation, using many of the same techniques as any intelligence services uses in its counterintelligence effort; in effect, spying on the United States.

The second fallacy is so ridiculous that I would not mention it except that it has cropped up repeatedly in discussion of this matter: That is, that someone may engage in good faith in the public disclosure of intelligence identities in order to improve the security practice of our intelligence agencies. This is like saying that a person might shoot members of Congress for the sole purpose of strengthening Capitol security by demonstrating shortcomings. Any patriotic citizen who believes that he has detected weakness in the cover arrangements used by a U.S. intelligence organization can serve the interest of improving security only by discreetly bringing that information to the attention of the organization itself, the President's In-

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telligence Oversight Board, or this committee or the Senate Select Committee on Intelligence.

The third fallacy is that those who seek the destruction of the Nation's intelligence activities cannot be distinguished from sincere critics of the CIA or other intelligence agencies and activities. The best answer to this is the one given by Attorney General Civiletti:

> Public comment and criticism of intelligence activities and specific operations is proper. Revealing the identities of particular intelligence personnel and placing them in danger, on the other hand, serves no legitimate purpose.

It is noteworthy in this regard that the Church and Pike committee investigations, the Rockefeller Commission Report, and related press disclosures, as well as the subsequent oversight activities of this committee and its Senate counterpart, all have managed to encompass extensive public and congressional scrutiny and criticism of intelligence activities without recourse to wholesale disclosure of the names of undercover intelligence personnel in the categories covered by H.R. 5615.

I believe that this committee and the Congress will find that we need to effectively put an end to the deliberate disclosure of the identities of our covert intelligence personnel for any reason.

That the unauthorized disclosure of the identities of individuals engaged or assisting in the foreign intelligence activities of the United States has damaged our Nation's foreign intelligence-gathering capabilities is beyond question. Obviously, security considerations preclude my confirming or denying specific instances of purported identification of U.S. intelligence personnel. Suffice it to say that a substantial number of these disclosures have been accurate. The destructive effects of these disclosures have been varied and wide-ranging

Our relations with foreign sources of intelligence have been impaired. Sources have evinced increased concern for their own safety. Some active sources, and individuals contemplating cooperation with the United States, have terminated or reduced their contact with us. Sources have questioned how the U.S. Government can expect its friends to provide information in view of continuing disclosures of information that may jeopardize their careers, liberty, and very lives.

Nearly all major foreign intelligence services with which we have liaison relationships have undertaken reviews of their relations with us. Some immediately discernible results of continuing disclosures include reduction of contact and reduced passage of information. In taking these actions, some liaison services have explicitly cited disclosures of intelligence identities.

We are increasingly being asked to explain how we can guarantee the safety of individuals who cooperate with us when we cannot protect our own officers from exposure. You can imagine the chilling effect it must have on a source to one day discover that the individual with whom he or she has been in contact has been openly identified as a CIA officer. The impact in this regard is twofold: First, there is a substantial adverse impact on the Agency's ability to collect intelligence; second, some of our foreign sources who must remain in place in spite of the disclosure may be subject to severe sanctions.

The professional effectiveness of officers so compromised is substantially and sometimes irreparably damaged. They must reduce or break

contact with sensitive covert sources. Continued contact must be coupled with increased defensive measures that are inevitably more costly and time consuming. Some officers must be removed from their assignments and returned from overseas at substantial cost. Years of irreplaceable area experience and linguistic skill are lost. Reassignment mobility of the compromised officer is impaired. As a result, the pool of experienced CIA officers is being reduced. Such losses are deeply felt in view of the fact that, in comparison with the intelligence services of our adversaries, we are not a large organization. Replacement of officers thus compromised is difficult and in some cases impossible.

Once an officer's identity is disclosed, moreover, counterintelligence analysis by adversary services allows the officer's previous assignments to be scrutinized, producing an expanded pattern of compromise through association. Such disclosures also sensitize hostile security services and foreign populations to CIA presence, making our job far more difficult. Finally, such disclosures can place intelligence personnel and their families in physical danger from terrorist or violence-prone organizations.

Mr. Chairman, I am prepared to discuss in executive session individual cases which exemplify the damage done to our intelligence-gathering capabilities. Most significant, however, is the fact that the collection of intelligence is something of an art. The success of our officers overseas depends to a very large extent on intangible psychological and human chemistry factors, on feelings of trust and confidence that human beings engender in each other, and on atmosphere and milieu. Unauthorized disclosure of information identifying individuals engaged or assisting in foreign intelligence activities destroys that chemistry. While we can document a number of specific cases, the committee must understand that there is no way to document the loss of potential sources who fail to contact us because of lack of confidence in our ability to protect their identities.

In a time when human sources of intelligence are of critical importance, there can be no doubt that unauthorized disclosures of the identities of our officers, agents and sources constitute a serious threat to our national security.

Current law has proved to be inadequate in deterring these unauthorized disclosures, and they continue to be made with virtual impunity. The net result is a damaged intelligence capability and reduced national security.

Mr. Chairman, I believe that legislation in this area, to be effective, should contain certain key distinctions and elements. First, it should hold current and former employees and others with authorized access to protected information to a higher standard than persons who have not had such access. Such individuals, because of their employment relationships or other positions of trust, can legitimately be held accountable for the deliberate disclosure of any identity they know or have reason to know is protected by the United States.

Second, the legislation should require proof that a disclosure is made with culpable knowledge, or with knowledge of sufficient facts to make the average person aware of the nature and gravity of his actions. This is an important element because it must describe a state of mind which will support the attachment of criminal sanction, while at the same

time be capable of proof in those disclosure cases which have been damaging. If a person discloses a protected intelligence identity with knowledge or reason to know that the United States takes affirmative steps to conceal the intelligence relationship involved, that person has acted with culpable knowledge. This knowledge can be demonstrated when the person making a disclosure states awareness that a cover employment or other concealed relationship is involved.

Finally, a statute should require proof that unauthorized disclosures by those who have not had an employment or other relationship of trust with the United States were made with the specific intent to impair or impede the Nation's foreign intelligence activities. This requirement would be for the protection of those who might claim they have made a public disclosure for a legitimate purpose although I believe Congress should determine if there are any such purposes and make provision for them.

For example, if the Congress finds that current requirements and procedures for reporting allegations of illegal or improper activity by intelligence employees may not be sufficient to discover such an activity, it could provide in statute for direct reporting to the Congress, or to the Attorney General, or even to the President. In this way it could be made clear that there is no justification for the public disclosure of protected intelligence identities.

In my view, H.R. 5615 goes a long way toward meeting these criteria. It is a carefully drafted, crafted and narrowly drawn measure which comes to grips with the full extent of the problem. The committee's bill would go far toward safeguarding vital intelligence capabilities without impairing the rights of Americans or interfering with congressional oversight. In the opinion of the Agency's lawyers, the bill would make possible prosecution of those who seek to destroy the intelligence capabilities of the United States, while leaving untouched legitimate criticism of the intelligence community or its activities.

There are, however, several improvements to the bill which I would urge you to make.

First, the Department of Justice, in its comments on the bill, has suggested that persons who are not present or former intelligence employees should be covered whenever the disclosure is based on classified information. We do not think that this formulation would adequately cover all cases, since in many of the most egregious current cases, a nexus to classified information would be difficult to prove beyond a reasonable doubt. Thus, I cannot support this formulation as a substitute for section 501(b). On the other hand, I am persuaded by the Justice Department's arguments that there may be some cases in which the specific intent to impair or impede U.S. intelligence activities would be difficult to prove, but in which a nexus to classified information would not. In order to provide full coverage, therefore, I would propose that section 501(b) be revised to provide two alternative bases for liability. One would be the disclosure with the specific intent to impair or impede the foreign intelligence activities of the United States; the other would be the disclosure of identities based on classified information.

A second area requiring improvement relates to the prosecution of accomplices and conspirators. As now drafted, H.R. 5615 would bar

such prosecution in all cases unless the alleged accomplice or conspirator possessed the specific intent to impair or impede the Nation's foreign intelligence activities. I understand and agree with the advisability of requiring such a specific intent in the case of an accomplice or conspirator to violate section 501(b) of the bill.

On the other hand, I see no reason to immunize persons who assist or conspire with current or former employees or others having authorized access to classified information in the commission of an offense under section 501(a). With respect to this latter group of accomplices and conspirators, there should not be a specific intent requirement.

H.R. 5615 does not cover disclosure of the identities of former officers or employees of an intelligence agency or members of the Armed Forces formerly assigned to duty with an intelligence agency. To be effective, the legislation should extend to these categories of persons. Many officers and employees retire or are separated under cover for a variety of reasons. Disclosure of their former intelligence agency affiliation may place them or their families in physical danger or may subject them to harassment or threat of bodily injury. Moreover, there are very real counterintelligence reasons for maintaining cover. In many instances, the individual's contacts and sources may still be in place and active. Such a network may have been passed on to the former officer's successor. Should the former individual's relationship be revealed, the entire network may be compromised. Accordingly, in those cases where such relationships remain otherwise concealed and where the United States continues to take affirmative measures to keep them concealed, unauthorized disclosures should warrant attachment of criminal liability.

Mr. Chairman, there is a pressing need for effective legislation to discourage unauthorized disclosures of intelligence identities. The credibility of our country in its relationships with foreign liaison services and agent sources, the personal safety and well-being of patriotic Americans serving our country, and the professional effectiveness and morale of our country's intelligence officers are all at stake.

As matters now stand, the intentional exposure of covert intelligence personnel with impunity implies a governmental position of neutrality. It suggests that U.S. intelligence officers are fair game for those members of their own society who take issue with the existence of CIA or find other perverse motives for making these unauthorized disclosures. Specific statutory prohibition of such action is critical to the maintenance of an effective foreign intelligence service. It is imperative that a message be sent that the unauthorized disclosure of intelligence identities is intolerable.

I sincerely appreciate your genuine concern about our intelligence capabilities and wholeheartedly support your efforts to deal with this serious problem. I encourage you to proceed to report legislation that will provide an effective remedy. I believe effective legislation to protect intelligence can and should be made a key part of the foundation for the revitalization of our Nation's foreign intelligence capabilities.

We have supplied the committee with some suggested drafting changes in H.R. 5615. Mr. Silver and Mr. Hitz and I will be happy to

discuss these matters in greater detail or to answer any questions you may have on them.

Thank you, Mr. Chairman.

Mr. MAZZOLI. Thank you very much, Mr. Ambassador.

You were here this morning when our majority leader spoke on behalf of his bill, on behalf of this whole subject area, and you heard him say that this was a very important part of the Democratic agenda for the second session, it was a bill to which the President had committed his support. And, of course, there was a lot of discussion back and forth and using terms, "outrageous" and "unconscionable" and this sort of thing, and I wonder, are we overstating the case? Are we overkilling here? Could you as a professional member of your organization have stated the case as persuasively as you did this morning half a year ago or a year ago?

Ambassador CARLUCCI. Mr. Chairman, let me say that first of all, I am not a professional CIA man. I have been with the organization a little over 2 years. I am a professional foreign service officer who has dealt with the organization for some 20 years. And I think I understand it fairly well without being an integral part of it.

I think it is fair to say that since I have been in the CIA at least there is nothing that has been more damaging to morale and to the effectiveness of the Agency than this kind of activity, that is to say, the unauthorized disclosure of the identities of our CIA personnel and their agents.

I had some personal experience when I was Ambassador to Portugal. I watched one of these so-called exposés name people in the Embassy that I then headed. Not only did they name them, but they provided the addresses and such details as "second apartment to the right after you get off the elevator," a clear incitement to violence. I watched the careers of able and dedicated officers being ruined. We had to transfer people. Sources began to dry up.

Since I have been with the Agency I have seen this occur around the world. I happened to arrive in one country on a trip about 7 or 8 months ago and was greeted at the airport by a young officer who had that very morning been exposed in one of these so-called bulletins, CovertAction Information Bulletin. He was an able young officer who had worked for 8 or 10 years to conceal his identity. He had valuable assets in the country. All of that was now worthless. His assets were unwilling to have contact with him. He would have to be transferred, his career potential clearly diminished.

We have had cases where Ambassadors have said, we cannot accept this assignment because this person has been exposed.

Clearly this has been highly damaging to our intelligence capability overseas. It was damaging 2 years ago. The longer it goes on, the more damaging it becomes.

Mr. MAZZOLI. Mr. Ambassador, you have your legal expert with you. Perhaps you could address this question, or perhaps he could. Can current law—and there is a range of statutes on the books today which deal with unauthorized disclosures and sensitive information—do the job today, properly enforced?

Ambassador CARLUCCI. I will ask my legal expert, General Counsel Mr. Silver, to address that in detail, but let me just make a comment.

Since I have been with the Agency we have held detailed discussions, lengthy discussions with the Department of Justice in an effort to cope with this situation under current law. We have looked at the possibility of criminal suits, we have looked at the possibility of civil suits, and while in some cases that may be theoretically possible, I think it is fair to say that as a practical matter, current law does not enable us to get at these activities.

But let me ask Mr. Silver to address that in more detail.

Mr. SILVER. I can't really add very much to what Mr. Carlucci has said. I think the proof of the issue is the fact that despite valiant efforts on our part and on the part of the Department of Justice, we have not found a practical way to apply the current statutes on the books, whatever their theoretical coverage may be, to the situation we face. Certainly, looking at H.R. 5615, there is a portion of the activity covered there that seems to me clearly to be covered under present law, but the statute would remove some difficulties of definition and interpretation that now exist.

There is another area of activity, that covered by section 501(b) that it would be very difficult to apply current law to, but which is, from our point of view, an extremely serious problem.

Mr. MAZZOLI. Well, my time has expired, and we perhaps will have time for a second round of questions.

The gentleman from Massachusetts, Mr. Boland, is recognized.

Mr. BOLAND. Mr. Carlucci, I want to thank you for what I think is an exceptionally fine statement in this area. If anyone knows what the problems are with respect to the intelligence community, the Director of Central Intelligence and his Deputy of course, recognize it better than most people.

You have had extensive experience in the Government. You have served with distinction in a number of capacities. I presume that one of the most important ones with respect to the problem that we have before us today was being Ambassador to Portugal, and I presume that in many, many instances you had contacts with our agents, chiefs of stations in various countries and particularly in the country that you served as Ambassador, and because of that, I presume you have a more definitive recognition of the danger to the collection of intelligence when names of agents are disclosed.

Did I hear you say that there was information with respect to agents or assets or chiefs of stations that was disclosed in the countries where you served as Ambassador?

Ambassador CARLUCCI. Yes; there was the so-called exposé of CIA personnel in Portugal when I was Ambassador there.

Mr. BOLAND. How serious an impact was that on our ability to collect intelligence? And that was a very important area at that time, at the time you were serving there.

Ambassador CARLUCCI. Mr. Chairman, it is difficult for me to go into detail in public session. Let me say that it had a significant impact on our ability to collect intelligence. We had to rotate a number of people. That, of course, has an impact on their sources of information, when somebody new has to come in.

Let me also say that the identifications that were made in this instance were not 100 percent accurate, and that people who were not

intelligence officers were implicated, and that was damaging to their careers as well.

Mr. BOLAND. In your statement you take pains to point out that names of agents cannot be gleaned from merely reading biographic registers and other lists. You state that it also takes extensive investigations, interviews, and other techniques. Of course, you recognize, as all of us do, that it is not illegal to engage in these latter activities which are open to any member of the public.

Now, my question is twofold. Isn't it true to say that some names of intelligence agents can be obtained, can be obtained from publicly available sources without the use or disclosure of classified information?

Ambassador CARLUCCI. The names, per se, cannot be obtained from any single individual source. If I may, this is a very important point, Mr. Chairman, and let me elaborate on it. I said in my statement that what is involved here is essentially spying on the United States. There are groups who are engaged in fairly sophisticated counterintelligence techniques. These techniques involve gathering information from a wide variety of sources. Much of the information that any intelligence agency gathers is unclassified at the outset. It is only when it is put together with other pieces of information and certain conclusions drawn that it becomes classified.

Now, using sophisticated techniques, people can try and identify the location in the embassies, look at travel orders, look at the pattern of assignments, try to obtain embassy telephone books, try to obtain copies of the "States Department Biographic Register," which is now a classified document, look at individuals' personal backgrounds, indeed, maybe even look at their patterns of activities in a given country; using all of these techniques, most of which would be from unclassified sources, they can come to a logical conclusion, not with 100-percent accuracy, but with substantial accuracy.

So what we have involved here is not somebody simply going to the Library of Congress and opening a book and seeing John Doe has a certain designator therefore he is a CIA man. What we have are people who have developed highly sophisticated techniques, which in some cases have been learned within the Agency, and are applying these techniques to impede the effective activities of our intelligence agencies.

Mr. MAZZOLI. The gentleman's time has expired.

The gentleman from Illinois, Mr. McClory.

Mr. FOWLER. Would the gentleman yield for a followup question, and then I will give you some of my time.

Mr. MCCLORY. Certainly I will yield.

Mr. FOWLER. Mr. Ambassador, is the Agency asking us to legislate as illegal the activity that you describe, no matter how sophisticated and how deductive in its reasoning, if that information was gleaned solely from unclassified sources?

Ambassador CARLUCCI. We are asking the committee to legislate as illegal activity which pinpoints the names of our personnel or our agents when affirmative steps have been taken to conceal their identity, and when we can prove an intent to impede the intelligence activities of the United States.

Mr. FOWLER. Well, the key to that would be, would it not, what constituted the intent then?

Ambassador CARLUCCI. That is correct; we would have to demonstrate intent.

Mr. MCCLORY. Why don't you continue and I will take the next 5 minutes.

Mr. FOWLER. Just to follow that through, do you want to describe to us what you foresee as the criteria to prove intent, when the defendant could show that all sources from whence the revelation came were gleaned from unclassified material?

Ambassador CARLUCCI. Well, activities, such as are contained in this publication called CovertAction Information Bulletin, are avowedly for the purpose of impeding the intelligence collection activities of the U.S. Government.

Mr. FOWLER. I don't think there would be any question about that, but let's say I am a jackleg reporter for a great metropolitan newspaper, and I decide that I want to—that I see somebody engaged in what I think to be suspicious activity, for whatever reason, maybe after a narcotics bust, or I may be after a spy in my hometown. But I go and ask some questions of the military and find from public documents where he has served; I can trace pretty much in an unclassified manner where he has served in the Army and what Government posts he may or may not have had. I could follow him around for a while and see that he wears trenchcoats and went to strange places after hours, even took notes on rolled-up Time magazines, and I put together—I am not really being facetious, but as a good investigative reporter, I might then conclude that this man was a spy and write that in a story, that such and such, in my opinion, was a spy for the Soviet Union. And maybe I just happen to be right.

Could I be prosecuted under the legislation that you are——

Ambassador CARLUCCI. Well, certainly not for identifying somebody who is a spy for the Soviet Union. We don't——

Mr. FOWLER. I'm sorry; the other way around, a spy for us.

Ambassador CARLUCCI. Well, if you identify him as an employee of a U.S. intelligence agency—first of all, I would go back to my original comment that it seems to me there is no redeeming social purpose in doing this. It doesn't help with the oversight process, and if some person believes there is an abuse being created, there are plenty of channels to report those abuses, including this committee.

Mr. FOWLER. Let me interrupt you, Mr. Ambassador, because we all agree, as you know, on the need to protect our sources and our agents, but with the Agency coming in and asking to legislate, the question that I think is going to have to be determined is whether or not in the unclassified field, whether the remedy is in the legislative branch or in the Agency to tighten its own procedures. But under the examples again, that has to be dealt with specifically, whether or not a journalist, in reporting what he perceives to be intelligence-gathering activity by an employee of our Government which all could be gleaned from unclassified sources, whether you are asking us that that ought to be legislated a violation of the security laws of our country.

Ambassador CARLUCCI. Mr. Fowler, I am not a lawyer, and I will ask our General Counsel to address this. It seems to me that in the

example that you have described, if somebody were to publish one newspaper article saying I think John Doe may work for the CIA, and there is no evidence in that article of intent to impede or impair the intelligence activities of the U.S. Government, that that would not fall under the legislation as we interpret it.

However, if this individual should embark on a crusade which, the purpose of which is obviously to impair the effectiveness of our intelligence activities, say, he should visit 10 or 20 other cities and go overseas and conduct a counterintelligence operation on a crusade to identify the names of CIA personnel or their agents, then I think that would be a different thing and it would fall under the statute.

Let me ask Mr. Silver to address it in some detail.

Mr. SILVER. I would like to make one comment, and that is to draw an analogy to statutes that are on the books that prohibit such things as the photographing of fortifications, passage of information about the movements of troops, and a variety of other things in time of war that are not in themselves classified. You cannot classify the external appearance of a U.S. Government facility that anyone can see. Those statutes have an element, and that is the specific-intent element, and it is that very element which courts have relied upon to determine that those statutes are constitutional. It is, from my point of view as a lawyer, clear to me that without a specific-intent element, a statute that applied to someone who dealt only with unclassified information and phenomena would have serious constitutional problems. But this bill, which your committee has very carefully drawn, avoids those problems and I think would be completely inapplicable in the example that you cite.

Mr. FOWLER. My time has expired, Mr. Chairman.

Mr. MAZZOLI. We will have a second round.

Mr. FOWLER. Let me conclude my thought. As you all know, we are all cosponsors of this legislation. We see the need for it and we just have got to be very careful that we don't—especially with these new amendments that you have added in the unclassified field—that we are not crafting this legislation specifically to deal with the Agee problem and the Agee problem alone, because that is a blatant, obvious example, and I would like to pursue that further.

Mr. MAZZOLI. The gentleman from Illinois is recognized for 5 minutes.

Mr. MCCLORY. Thank you, Mr. Chairman.

I want to commend personally and publicly Mr. Carlucci for his distinguished and his courageous and effective service. I did have the opportunity to visit with Mr. Carlucci in Portugal at the time when he was serving our Nation there, and I have personal knowledge of his tremendous and important service to our Nation, and I am grateful indeed that we have you, Mr. Carlucci, in the position in which you are now as the Deputy Director of CIA.

Ambassador CARLUCCI. Thank you, Mr. McClory.

Mr. MCCLORY. I am also encouraged by the statement from the majority leader, and I am glad to know about the Democratic priority which is being placed in this area. I would say that President Carter appears to be adopting positions which the Republicans and which I have been advancing for several years, and there seems to be an

awareness of the great danger militarily which we are experiencing now which apparently he wasn't fully aware of before.

But the point that concerns me now is with regard to these new directions to strengthen our intelligence agencies and their capabilities. Is the administration giving you support? Are you—we have a divergence of points of view here which are being presented this morning on the part of the Department of Justice and the CIA, and I would like to know, where is the administration position? Where is the administration backing?

That seems to me to be extremely important as far as our action is concerned.

Ambassador CARLUCCI. Mr. McClory, let me say that the administration recognizes this as a very serious problem. I have on a number of occasions heard the President address himself to it.

We also recognize, as Mr. Fowler has pointed out, that there are sensitive issues at stake here, first amendment rights, and that the legislation has to be well crafted. We have some differences with the Department of Justice as to the best way to approach this problem. We naturally happen to think our approach is more effective, but we think that this committee which has the basic responsibility for reporting the bill, ought to hear both points of view and reach its own conclusion.

Mr. MCCLORY. You feel, do you not, that it is vital that we include persons outside the Central Intelligence Agency, outside of your agency in this legislation?

Ambassador CARLUCCI. Yes, sir, I do.

Mr. MCCLORY. Now, I wonder about this. Since you do work with the FBI as far as counterintelligence is concerned, certainly wouldn't it likewise be important for us to have the FBI covered so that their covert operations, their persons operating under cover would be protected by the same legislation?

Ambassador CARLUCCI. Mr. McClory, the FBI will have to speak for itself, but we in the CIA would have no objections or problems with that.

Mr. MCCLORY. Now, with respect to section 505(6), you feel, do you not, that that can be changed as you have indicated in your testimony.

How do you feel about it being changed to include members of the business community who travel overseas and who share information with the CIA upon returning to the United States?

Ambassador CARLUCCI. You are talking about the definitions?

Mr. MCCLORY. This would be people outside of the intelligence community.

Ambassador CARLUCCI. Agent, informant, and source of operational assistance.

Mr. MCCLORY. Just people, American people, but they share information and they do it covertly.

Ambassador CARLUCCI. I personally wouldn't have any problem with that. It would seem to us that people in the United States such as businessmen who cooperate with us—and that cooperation is very valuable—are not exposed to quite the same degree of risk as people overseas, but should the committee want to include them, that would not trouble us at all.

Mr. MAZZOLI. The gentleman's time has expired.

I think we have time, and since the Ambassador is very important to the legislation, does the gentleman from Massachusetts have a followup question?

Mr. BOLAND. Yes; paralleling the question I asked with reference to the obtaining of information without disclosing classified material, you indicated that through sophisticated mechanisms and brilliant investigative reporting, it is possible to pick up information which may be in the public domain. I don't take it that you would consider it to be in order to consider it a crime to disclose what was obtained from public sources?

Ambassador CARLUCCI. Well, I am not sure of the burden of your question, Mr. Chairman. If an individual puts together from public sources information that leads to the identification of agents or CIA personnel overseas, and once again, we can prove intent to impede or impair the effectiveness of our intelligence collection activity, then I would favor it being included.

Mr. BOLAND. Well, that puzzles me a little bit. It seems to me that what you are saying is that the investigative reporter or the statistician or the person who uses sophisticated techniques to put together all this information, that he ought to be, in putting together an indication that a particular agent or chief of station is a member of the intelligence community, that after all of what he has done he comes to this conclusion, but he has picked it all up from public sources, I take it that you think that——

Ambassador CARLUCCI. May I pose an extreme example, Mr. Chairman, just to illustrate the point?

Supposing you have an embassy in country X, and a group of misguided people wants to identify the CIA people in that embassy. They could conceivably take a number of people and put them in that country and follow some of the people they suspect on all their activities—physical surveillance, so to speak. They might even arrange for some electronic surveillance. None of that would be classified. But over a period of time they could conclude that the pattern of activities was such that this individual worked for the CIA. There would be a clear intent here to impede or impair the intelligence collection activities of the U.S. Government. I think the bill ought to cover that kind of activity.

Mr. BOLAND. Well, that is an area that we have to wrestle with, of course.

But in any event, I am glad to get your opinion on it.

Ambassador CARLUCCI. If I may, Mr. Chairman, I think possibly you and I are talking at cross purposes here because we are satisfied with the basic structure of the committee bill, H.R. 5615, as regards people who expose CIA personnel and agents when there is an intent to conceal that identity by using unclassified information, and I would underscore that here the committee draft requires the proof of intent to impair the intelligence activities of the U.S. Government.

Mr. BOLAND. I understand that; but whether or not it is in the committee bill, should it be a crime to disclose what was obtained from public sources?

Ambassador CARLUCCI. If the U.S. Government is taking affirmative steps to conceal the identity of those individuals, and if there is an intent to impair or impede the intelligence activities of the United States, we would favor making it a crime, yes, sir.

Mr. BOLAND. Thank you, Mr. Carlucci.

Mr. MAZZOLI. The gentleman's time has expired.

Let me take my additional time here at this point and refer you, Mr. Ambassador and Mr. Silver, to page 18 of your statement where you suggest that if Congress finds that current requirements and procedures for reporting allegations of illegal or improper activity by intelligence employees may not be sufficient to discover such activity, it, the Congress, could provide in statute for direct reporting to the Congress, or to the Attorney General, or even to the President. In this way it could be made clear that there is no justification for the public disclosure of protected intelligence identities.

Would it be your feeling and is there any basis in law for suggesting that if we were to put something like this in a bill, reaffirming the intent of Congress to provide an avenue for the appropriate disclosure to the authorities or to Congress where wrongdoing is taking place, where overreaching has occurred, that that would then make the burden of proof of suggesting an intent to impede or impair national security a little easier to make, and a little more clear cut, and would satisfy some of the problems you see developing in 501(b)?

Ambassador CARLUCCI. As a nonlawyer, it would seem to me that it would, but let me defer to the lawyer.

Mr. SILVER. Well, there is another provision in the bill that provides that the mere fact of disclosure cannot be used as a basis for drawing an inference of intent, so I think even with the change that you have suggested, Mr. Mazzoli, the Government would have to find some additional evidence of intent other than the mere act of disclosing, but we would heartily endorse any measure that makes it clear that the purpose of this legislation is not to cut off or stifle criticisms or exposure, through appropriate channels, of alleged impropriety.

Mr. MAZZOLI. I guess what I am driving at, if you offer one avenue for people who have right-minded concerns about where our intelligence agency is going, and that avenue is not pursued, then the pursuance of the other which leads to disclosure of names would then not alone be intent, but would certainly evince something about the person's intent.

Would that be a fair statement, from a lawyer's standpoint?

Mr. SILVER. I think that would be correct.

Mr. MAZZOLI. I thank you, and my time is expired.

The gentleman from Illinois, 5 minutes.

Mr. MCCLORY. Thank you. I don't know that I need 5 minutes, but I would like to get some good support for a couple of things that I covered before, and one is: Do I understand you would support amendments that would include the FBI?

Ambassador CARLUCCI. I indicated that the FBI would have to speak for themselves, but we would have no problem with them, and my own judgment would be that it is perfectly appropriate.

Mr. MCCLORY. And likewise, I am aware that there have been tremendous pressures to exclude journalists from cooperating with the

CIA. And, I think representatives of multinationals are very wary now because if they cooperate clandestinely, this fact could be blown and it would do damage not only to their company and their careers but even to our country. So could I get a clear understanding from you that where business personnel or any other person—including journalists, for that matter, I don't care who the individual is, an American presumably—cooperates with you to provide information covertly, without the identity being known, should not that individual citizen—he may not be paid, may not be an actual informant, but he is a source of information vital to our country, he is a volunteer—but should not he be protected by this legislation just as well as a CIA agent operating under cover, or a former agent, or whomever it happens to be that is otherwise covered in the legislation?

I would like to have your support of that proposition. I think it is important to the American people. I think it is important to you getting cooperation from these kinds of individuals who, in my view, can be so extremely helpful.

Ambassador CARLUCCI. I would agree to their inclusion in the bill, Mr. McClory. Let me point out, though, that with regard to the cooperation of the American business community, it is not the exposure of United States—of identities that has been a problem as much as it has been the Freedom of Information Act, and of course we can address that in another forum.

Overseas, this kind of activity, exposure of identities, has had a very pronounced impact. It has had less impact on cooperation with American citizens here. But subject to review by our lawyers, I would certainly see no harm, and I would see some benefit in including it.

Mr. MCCLORY. Well, I agree with you entirely; I think we need to amend the Freedom of Information Act, too. I think it is just outrageous that foreign agents are getting information by virtue of that legislation, and that convicted felons are getting information about the informants or witnesses against them and such things, so that I am sure we should do that; plus, of course, amendment of the Hughes-Ryan Amendment and other measures.

So in a sense this is just a start. We have got a lot to do in order to revitalize and strengthen the CIA so that it can do the full, necessary job we need for our national security.

Ambassador CARLUCCI. I agree, Mr. McClory.

Mr. MAZZOLI. The gentleman's time has expired.

The gentleman from Georgia is recognized for 5 minutes.

Mr. FOWLER. Mr. Ambassador, while you are reviewing with your competent lawyers the suggestion of my friend from Illinois, the way I hear Mr. McClory's suggestion—and I would not impugn his motives, I know we are all trying to protect, again, our sources and our agents—but what I heard from that suggestion which you are going to review with your lawyers, is that an American businessman, who has never had any contact with the CIA, could care less about American intelligence, who happens to stumble upon the fact in country X, or somebody tells him or he hears it at a dinner party, that employee X of an American company abroad has a contract in the CIA, if our man just picks this information up casually and reveals it, he could be prosecuted.

Ambassador CARLUCCI. No; I think you misunderstood the intent of Mr. McClory's suggestion. I think his suggestion is directed at protecting the exposure of an American businessman who cooperates with the CIA. That is to say that they would be entitled to the same protection as an agent of ours overseas.

Mr. FOWLER. No; I am right, because under the legislation what you are proposing is the mere fact of his disclosing the name of the man that has the contract with the CIA.

Ambassador CARLUCCI. No; I respectfully disagree, Mr. Fowler.

Mr. FOWLER. Well, correct me where I am wrong. That is all I am trying—I am not cross-examining you.

The statute says if you reveal the names of our agents overseas.

Ambassador CARLUCCI. But Mr. McClory was talking about including U.S. persons in the definitions category.

Mr. FOWLER. Well, let's leave Mr. McClory out of it for a minute.

Ambassador CARLUCCI. Section 505(6)?

Mr. FOWLER. Another example: If I casually find out at a dinner party—I am an American businessman; I go to country X and I hear this and then I mention it: I am revealing the name of a man that has a contract with CIA. Could I be prosecuted?

Ambassador CARLUCCI. Once again, that would depend, once again, on two factors, Mr. Fowler. It would depend on whether you were aware that the U.S. Government has taken affirmative steps to conceal that relationship, and second, it would depend on your intent, or the intent of that businessman. And if the intent is to impede or impair the intelligence collection activities of the U.S. Government, then yes; he would be covered by the statute.

If he is casually revealing it as cocktail party gossip, I think that is deplorable, but it would certainly not be covered under the statute.

Mr. FOWLER. All right, let me leave that for a second just for the sake of time.

How difficult would it be, do you perceive it to be, for the Government to prove an intent, to quote the statute, "to impair or impede the foreign intelligence activities of the United States," if the accused is a journalist?

Ambassador CARLUCCI. I think with regard to journalists, that is a very substantial threshold, but let me defer to my General Counsel.

Mr. SILVER. I would think—it depends what you mean by journalist. Anyone who cranks out multiple copies of the same piece of paper could be characterized as a journalist.

Mr. FOWLER. Just for the sake of argument, take the New York Times and the Washington Post.

Mr. SILVER. If you take the New York Times and the Washington Post, in my judgment it would be virtually impossible to prove such an intent, absent circumstances that, as far as I am aware, do not exist, that is, if the journalist in question were to go around the community boasting of the fact that he was on a personal vendetta or crusade against the Agency, yes, that would provide evidence from which his intent could be derived.

Mr. FOWLER. Well, a lot of people—again. I am playing devil's advocate. There are a lot of people who think that there ought not to be any foreign intelligence activity by this country, period. They are protected in that opinion by the Constitution of the United States.

If a journalist happens to be one of those and publishes articles, again based on unclassified information, I assume that you could make a case that that would show intent to impair or impede the foreign intelligence activities of the United States, especially when he says we ought not to have any foreign intelligence activities.

Ambassador CARLUCCI. Well, in fact, people who purport to be journalists are doing just that under CovertAction Information Bulletin. Anybody can pick up the rubric of a journalist by writing a few articles. If that is what you are talking about, I question whether responsible news organizaions such as the New York Times or the Washington Post, which we were discussing—they would have to speak for themselves, but I question whether they would embark on some kind of a crusade deliberately to impede or impair the intelligence activities of the United States.

Mr. MAZZOLI. The gentleman's time has expired, and Ambassador Carlucci, we thank you very much for your time.

We would like to welcome at this time our next witness, Associate Deputy Attorney General Robert Keuch.

Mr. Keuch, you may come forward with any of your associates you may have.

I might say that Mr. Keuch, like Ambassador Carlucci, is certainly no stranger to the committee. He has informed us and enlightened us on many other occasions, and the gentleman has been with the Department of Justice since 1960, and most of the years in the Criminal Division, and again, you have helped us on many of our bills, including our foreign intelligence wiretap bill of last year. We welcome you and solicit your information on these bills before us today.

STATEMENT OF ROBERT L. KEUCH, ASSOCIATE DEPUTY ATTORNEY GENERAL

Mr. KEUCH. Thank you, Mr. Chairman.

Mr. Chairman and members of the select committee, I am pleased to have the opportunity to testify today on the select committee's proposed Intelligence Identities Protection Act.

The Department of Justice strongly supports the passage of legislation to provide new criminal penalties for unauthorized identification of the covert intelligence agents and sources who serve this country overseas. A strong foreign intelligence capability is essential to the national security of the United States. The quality of our intelligence gathering will be measurably diminished unless we can prevent unauthorized disclosure of the covert intelligence roles of our agents and sources. Such disclosures not only impair our foreign intelligence and counterintelligence activities, but can expose individual agents and sources to physical danger. Accordingly, the Department of Justice supports the passage of legislation to prevent unauthorized disclosures and to provide appropriate punishment when such disclosures do occur.

It is our opinion that the knowing disclosure of the identity of a covert intelligence agent or source of the Central Intelligence Agency or a foreign intelligence component of the Department of Defense

knowingly based on classified information constitutes a violation of the current espionage statutes found in title 18, section 793(d) and (e). However, the passage of an act dealing specifically with the disclosure of covert identities will be an aid to effective law enforcement because the Government will be able to avoid several hurdles which exist in prosecutions brought under the present espionage statutes.

The select committee presently has under consideration H.R. 5615, a bill introduced by Chairman Boland and the other members of this committee. The Department of Justice has developed its own proposed bill, a copy of which is attached to my prepared statement. We believe the Department's bill will serve the same end as H.R. 5615, yet avoid some areas of controversy and unnecessary difficulties for effective prosecution which the House bill might present.

A brief introduction to the Department's bill is probably the best way to start the discussion. The Justice Department bill would create two new offenses. The first, section 801, would prohibit the knowing disclosure of information correctly identifying covert agents by any person acting with knowledge that the disclosure is based on classified information. This provision would cover persons whose access to such information was unauthorized, as well as those who had authorized access. It includes within its prohibition the identification of any covert agent, employee, or source who is currently serving outside the United States or has so served within the last 5 years, and would cover unauthorized disclosures by any American citizen or permanent resident alien, even if made abroad. A penalty of up to 10 years and $50,000 fine can be imposed for each offense. There is an "attempt" provision to permit punishment of those persons who have taken any substantial step toward knowing disclosure of identifying information with knowledge of its classified source, even though they are detected before completing the offense.

This part of the Justice Department bill would extend to classified covert identity information the same protection against disclosure currently provided under Federal law for classified communications intelligence information and cryptographic intelligence information. See 18 United States Code section 798. It removes any question about the covered means of disclosure which might arise under the espionage statutes currently applicable to identify information in the aftermath of the Pentagon papers case, and will make it crystal clear that publication in a newspaper or book is as much prohibited as any other means of communication or transmission. And of course, I am referring to the *New York Times* v. *United States* opinion at 403 United States Reports 713, and Justice Douglas and Justice White's concurring opinions.

Finally, it would eliminate the need for the Government to demonstrate that the identity information revealed, in each particular case, is related to the national defense and could be used to the detriment of the United States or the benefit of other nations.

The Department's bill contains a second provision, section 802, which provides additional protection against identity disclosures by imposing a powerful constraint on the class of current and former Government employees who have ever had access to information concern-

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ing covert identities in the course of their employment. Such access can engender a special expertise in discerning how covers are arranged and a special authority and credibility when the employee speaks in the public area concerning intelligence activities. These persons would be prohibited from making any disclosures of agents' or sources' identities to unauthorized persons, even if the particular disclosures were based purely on speculation or publicly available information. This new restriction on discussion of information that is publicly available is justified for this limited group of present and former Government employees because of the inside knowledge regarding methods of establishing effective covers potentially gained in the course of their employment. Unlike other Americans, the persons coming within the reach of this provision occupy or have occupied positions of special trust within the Government, and are or have been in a position to learn how the United States establishes cover identities for its agents abroad and conceals its relationships with foreign intelligence sources.

To permit such persons to piece together the identities of covert agents, even though the conclusions as to particular agents and sources are based on publicly available information, would pose a concerted threat to the maintenance of secret intelligence relationships. In addition, such persons, even after they leave Government employment, will be imbued with a credibility stemming from their Government service when they discuss intelligence information. As a result, the Department believes that additional restrictions are justified and can be sustained for this class of persons, even for disclosure of unclassified information. A 5-year term and $25,000 sentence could be imposed on any such person who knowingly discloses information that correctly identifies a covert agent, or who attempts to do so, under the Department's bill.

The committee's bill, unlike the Department's, does not seek any enhanced protection against the disclosure of classified information as such. Instead, both provisions of H.R. 5615 would give uniform treatment to the disclosure of classified and unclassified information concerning agent identity.

The first provision of H.R. 5615, 501(a), is similar to the second provision of the Department's bill, section 802, in that it seeks to restrict the disclosure of identifying information, even when based on publicly available materials, by persons who presently have, or formerly had, authorized access to classified Government information concerning covert identities, and who, from that former position of trust, reasonably owe a special duty of confidentiality.

It should be noted, however, that in 501(a), the House bill apparently intends to cut a wider swath than the Department's section 802. The House bill would apparently criminalize disclosures of indirect identifying information even where the person did not actually know the information would identify a protected source, but only had "reason to know." This seemingly amounts to a negligence standard in regard to the effect of indirect identifying information, punishing a failure simply to weigh carefully enough what the identifying impact of indirect information would be. In contrast, the Department would confine its felony provision to knowing identifications. We believe the Department's culpability standard is better proportioned to the severity of the penalty than is the House bill's standard.

The second provision of H.R. 5615, section 501(b), would create a misdemeanor offense that covers all persons, including those who have never served in the Government and never have had access to classified or inside material of any sort concerning foreign intelligence. Section 501(b) extends to these persons a uniform prohibition against disclosing publicly available information that identifies a covert agent or source, with the added element that the person must have disclosed it "with the intent to impair or impede the foreign intelligence activities of the United States." Again, in the case of indirect information, the person need not actually know that the information would have the cumulative impact of identifying an agent or source, but need only have "reason to know."

In proposing a section of such breadth, the House bill marches overboldly, we think, into the difficult area of so-called "born-classified" information, an area that has not yet been litigated in a criminal context. The House provision would cover disclosures of publicly available information made by ordinary citizens who claim no special expertise in intelligence affairs and have not held special positions of trust nor associated with others who have. Conversational speculation about whether foreign official X may have been a CIA source and whether we have covert operatives in country Y, ordinary discussions by citizens about foreign affairs and the extent and nature of our intelligence activities abroad, even if based on no studied expertise or scholarly background, could come chillingly close to criminality under the standard of 501(b).

The scienter requirement, that an individual must have acted with "intent to impair or impede the foreign intelligence activities of the United States," is not a fully adequate way of narrowing the provision. First, even such a scienter standard could have the effect of chilling legitimate critique and debate on CIA and other foreign intelligence agencies' policies. A mainstream journalist who may occasionally write stories based on public information mentioning which foreign individuals are thought to have intelligence relationships with the United States, might be fearful that any other stories critical of the agency could be used as evidence of an intent to impede foreign intelligence activities. Speculation concerning intelligence activity and actors abroad would be seemingly more hazardous if one had ever taken even a general position critical of the conduct of our covert foreign intelligence activity.

And yet, even as it may chill legitimate journalists, that same intent requirement could pose a serious obstacle, in our view, in any attempted use of section 501(b) to prosecute individuals who for no reasonable purpose of public debate expose wholesale lists of our intelligence operatives. The intent element mandates that in every case where a defendant fails to admit an intent to impair or impede, a serious jury question on the issue of intent will arise. A defendant could claim that his intent was to expose to the American people questionable intelligence-gathering operations which he "believed" to be improper, rather than to disrupt intelligence operations, and the Government may find it a practical impossibility to ultimately establish the requisite intent beyond a reasonable doubt, thereby rendering the statute ineffective.

Second, and perhaps more importantly, the intent element will facilitate graymail efforts by a defendant to dissuade the Government from proceeding with the prosecution. Under 501(b) of the House bill, a defendant will be able to argue for disclosure, either pretrial or at trial, of sensitive classified information relating to the alleged activities of covert agents, on the ground that the information is relevant to the issue of whether he intended the revelations of identity to impede American intelligence activities or rather intended the revelations to lead to supposed reform or improvement of future intelligence activities.

We believe that the alternative provision of the Justice Department bill, section 802, which I described earlier, would provide protection against escalation of the undesirable actions of anti-intelligence groups over the last several years, and yet would avoid these problems posed by the House bill. Section 802 would prevent present and past Government employees, who gain a sophistication in methods of establishing covert identities from their inside Government knowledge, from misusing that knowledge to piece together public record facts in a way that an ordinary layman could not do. Undisclosed methods of creating intelligence covers would not be subject to breach in a show-and-tell display by irresponsible former Government employees, unless they were willing to suffer a felony consequence. Restricting the ability of persons who formerly occupied positions of trust and service within the intelligence community to abuse that service-acquired expertise will go far in inhibiting the purposeless revelation of covert identities and future methods of establishing cover.

The general Federal accomplice and conspiracy statutes, 18 United States Code section 2 and section 371, would, we hope, act to prevent former inside employees from joining in concert with non-Government employees to effectuate the same wrongful ends by instructing them on methods of establishing cover and warranting the accuracy of the disclosures.

At the same time, section 802 would not affect the legitimate arena of public debate on intelligence activities. It affects only a narrow class of persons who owe a special duty of trust and confidentiality to their former employer. There is no "intent to impede" scienter requirement to inhibit responsible criticisms of the intelligence agencies or to lead to graymail problems or to turn criminal trials into extraneous debates on the propriety of intelligence activities.

For these reasons, the Department of Justice would recommend to the committee's attention its current draft proposal. We would be happy to work with the staff of the select committee to draft a bill that would avoid the pitfalls we believe currently are to be found within H.R. 5615.

Mr. Chairman, that concludes my prepared statement. If you or other members of the committee have any questions, I would be pleased to attempt to answer them at this time.

Mr. MAZZOLI. Mr. Keuch, thank you very much, and you certainly have made a thoughtful addition to the body of knowledge on these bills before the committee.

I am a little curious about a couple of things. One is, has this bill, your suggested bill, been sent to the staff, or is this the first time they have had a chance to look at it?

Mr. KEUCH. I believe the bill was sent to the staff, certainly as an appendix to my prepared statement, Mr. Chairman. I believe, however, there were some ongoing discussions with the staff, and in all fairness, I don't believe the final form was submitted.

Mr. MAZZOLI. Well, let me urge you to try to help us report the best kind of information. The quicker things can be sent to us, the better we have a chance to look them over.

Is my recollection hazy on the point of, or perhaps incorrect on the point of where the Department of Justice has stood in the past on the need for new legislation in this area, or am I correct in saying that you all were either reticent or against new legislation at one time?

Mr. KEUCH. I think perhaps reticent might be more accurate, Mr. Chairman, but as Mr. Carlucci pointed out, the Attorney General has indicated his support and the Department's support for this bill, and our hesitation really came from our belief, as I indicated in my statement, that many of these activities are covered by current law. Nonetheless, we agree that there is an advantage to this specific type of legislation and do support it.

Mr. MAZZOLI. Is this now the current position, that the Department of Justice can be stated as of today to be behind new legislation?

Mr. KEUCH. Yes, sir.

Mr. MAZZOLI. And that old legislation, that which is on the books today, however much theoretical coverage there may be, does not reach the point and the goal which we all agree on, so something new is needed.

Mr. KEUCH. I would answer that affirmative, as long as I am not heard to say that we do not believe that present law would not cover the activities we are concerned about.

Mr. MAZZOLI. You were here today with Ambassador Carlucci, and you noticed the statements and the questions raised by the committee. Most of them dealt with 501(b). There is little argument about 501(a).

Tell me how your 801 would change the committee's proposal on 501(a) in which there is relatively little fundamental disagreement, philosophical disagreement. How do you change that?

Mr. KEUCH. I think the two bills are pretty much parallel, Mr. Chairman. I think that the first section there is very little dispute about.

Mr. MAZZOLI. All right. Well, what is classified information which you would add to your 801?

Mr. KEUCH. The classified information, as we define it in the bill, would be any information or material that has been determined by the U.S. Government, pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security.

So what we mean by classified information would be that that has been classified pursuant to statute, regulation, or law. I guess I am restating the definition.

Mr. MAZZOLI. So in other words, if a member of the CIA who leaves the service came upon, while in service, the name of John Jones, who

was an undercover agent in Lisbon, because he heard it around a water fountain in a room in the CIA building, but divulged that after he left CIA service, that would not be covered in your bill.

Mr. KEUCH. I believe under the second section of the bill, the individual in your example did not have formal access to that information?

Mr. MAZZOLI. I would guess, in my example, he would not. He heard it over scuttlebutt over a cup of coffee that John Jones is actually a CIA agent and he is stationed in Lisbon, and later he divulges that.

That, I understand, would be covered by our 501 but it would not be covered by your bill; is that correct?

Mr. KEUCH. Well, I think it would depend. If we focus in on scuttlebutt, Mr. Mazzoli, in that kind of situation, probably not, but if it is an individual who even though his position did not require that he be given access to informants' files or assets' information, the rest of it, because of his official position had access to information other than scuttlebutt and rumors and the rest, he certainly would be covered.

Mr. MAZZOLI. So if it came across his desk in a piece of paper which wasn't labeled classified but somehow did divulge that John Jones is an undercover agent in Lisbon, then that would be covered by your bill?

Mr. KEUCH. It would not be our view that he could benefit from the fact that there was a negligent handling of that information.

Mr. MAZZOLI. Even though it wasn't stamped classified as such.

Mr. KEUCH. That's correct.

Mr. MAZZOLI. But it came across his desk.

Mr. KEUCH. That's correct.

Mr. MAZZOLI. Let me ask you this question. My time is about to expire.

Under your proposed 802, would that cover Philip Agee were he in the United States at this time?

Mr. KEUCH. Well, of course, under the jurisdictional statement of our statute, it would cover a gentleman such as Mr. Agee whether he was out of the United States or not.

Mr. MAZZOLI. You have that in your bill?

Mr. KEUCH. Yes, sir.

I think he has maintained his American citizenship, and if he satisfied the standards of that section, certainly.

Mr. MAZZOLI. He would be covered.

My time has expired.

The gentleman from Massachusetts is recognized for 5 minutes.

Mr. BOLAND. I take it that the Department of Justice was a little reticent to get into this field because it believed that present law really covered about everything that was necessary to protect the activities of agents.

Is that correct?

Mr. KEUCH. I think that is accurate, Mr. Chairman. I think I have testified to that in other appearances before this committee and the Senate committee, but again, I have to emphasize that we do believe it is helpful to have a specific statute, and we support that effort.

Mr. BOLAND. Well, this bill, as you know, was filed back in October of last year. That is about 3 months back. And I don't know that you

have actually commented upon that bill since that time, or made what particular objections the Department of Justice might have to it available to the staff. I am not sure of that, and you can correct me if I am wrong. But I am not sure that you made the Department of Justice position known, and this, to my knowledge, is the first time that we have seen a draft of your bill that is appended to your statement.

Now, what is the reason for that? This is very important legislation from many viewpoints, many viewpoints. It would occur to me that the Department of Justice had a responsibility of at least getting a look at our bill and determining what the objections are and offering suggestions so, to quote you, so that we would avoid the pitfalls that H.R. 5615 presents.

Mr. KEUCH. I quite agree, sir, and I think it is fair to state that there have been a series of communications and conferences with the staff over the drafting of your bill, et cetera. I hope I am not giving away covert information myself in indicating that I am sorry that the Department draft arrives here as late as it does. There were attempts to try to reach an accommodation between the views of the other parts of the executive branch and the Department on the House bill and other proposals that have been made in this area. Those attempts went on right up to as late as a week or a few days ago. While, I think one of the earlier gentlemen stated it may be embarrassing for various parts of the executive branch to be here with different views, I think this is an area where the issues are very complex, reasonable minds can reasonably differ, and an area where we have traditionally, I think, we come up with somewhat different approaches to these problems to this committee.

Mr. BOLAND. You are not telling me that they made an effort to draft this bill and write it up 2 days ago.

Mr. KEUCH. Oh, no, sir, no. Those efforts were continuing on, however. This bill has been in the drafting stage for a period of time, as have discussions with the staff on your bill. I am trying to indicate that the efforts to reach an accommodation of viewpoints continued up until a few days ago, and that, I think, unfortunately may have delayed our submission of the matter. However, I think that our concerns with the drafting of the bill, as I stated, I believe it is fair to say, have been known to the staff through the process of discussions of members of the Department with the staff.

Mr. BOLAND. Well, the drafting of the bill—what was in it I don't know whether or not was known to the staff. Was that available——

Mr. KEUCH. I'm sorry, sir. I was referring to our discussions of the formulation of the House bill and our feelings of what would perhaps better be a solution.

Mr. BOLAND. You suggest that the specific intent requirement of section 501(b) may have a chilling effect upon legitimate speech. By this do you mean that this section might be unconstitutional?

Mr. KEUCH. Well, we think it raises questions of constitutionality, but I think our prime concern is that it does have the chilling effect so that even if the individual who had that necessary intent—if you look at it, is the bill constitutional on its face, the individual who has that type of intent and who commits these acts, we think that meets constitutional muster. Our concern, however, is that particularly since the

bill provides, and I think correctly so, that the mere disclosure of the identity of covert agents will not in itself be taken as evidence of that intent, then you have to look at other matters. And what are those other matters going to be?

I think some of the responses that have been made here this morning well point out those other matters are going to have to be the individual's prior positions on our intelligence operations, the individual's announced intent as to what he was doing, and I don't think we should delude ourselves that once, if this legislation were passed, that those statements of intent and those mastheads and those intents will not be changed. In fact, I have found it interesting that in the litigation just recently over the passport, one of the attorneys for a gentleman that has been discussed here this morning indicated he was trying to improve our intelligence capabilities. It was an argument that was made to the court.

So I think our concern is that if you are going to look outside the mere disclosure of covert agents to determine what an individual's motive and purpose is in making that disclosure, you have to, of necessity, get into his prior positions on the intelligence capabilities, whether or not he has criticized or been critical of the Agency or not.

And of course, the first amendment is intended to cover a very broad range of people, you know, far beyond the Washington Post and the New York Times, those who have been extremely critical of our operations and of our intelligence operations, and what concerns us is that if you are going to look at that type of information for proof of the intent of the individual when he later makes a disclosure, we think yes, that that has a potentially chilling effect.

Mr. BOLAND. Thank you.

Mr. MAZZOLI. The gentleman's time has expired.

The gentleman from Illinois, Mr. McClory, is recognized for 5 minutes.

Mr. MCCLORY. Thank you, Mr. Chairman.

I seem to recall that about a year ago you were sitting there as a witness and you indicated to the committee that you felt that the existing laws were sufficient for purposes of prosecuting unauthorized disclosures of classified information.

Mr. KEUCH. Yes, sir.

Mr. MCCLORY. And what bothers me is that we seem to adjust our view with regard to the adequacy of the laws dependent upon political policy statements that are made by the administration or by the President, and today, with a new direction in foreign policy and a new, tougher line as far as strengthening the intelligence community, you and other branches of the executive department are supporting amendments to legislation, including this bill and other bills that we have made reference to.

What, if anything, has actually happened insofar as your prosecutions or nonprosecutions of persons who have made unauthorized disclosures that alters your position and indicates support for some legislation, if only the bill that you are recommending?

Mr. KEUCH. Sir, I can't say that anything has happened in the context of our prosecutions or investigations of individuals who have disclosed classified information. I think we are discussng, however,

under one term two different considerations. One is whether or not we believe—and I think I did testify, and I have again this morning that it has been the Department of Justice's view that the present statutes do cover this type of activity. On the other hand, that does not bar the fact that there can be advantages to more specific legislation that has different standards and avoids some of the problems that we have in the present statutes. And the Attorney General indicated his support for that.

I might say that this is not a new change. It was the Attorney General named Griffin Bell who, at a meeting with the Director of the CIA almost a year ago, I think, pledged the Department's support to help this committee and the agency draft legislation in this area.

So again, I don't think I can say there has been a change because of prosecutions or failure of prosecutions, but certainly we believe that there is an advantage to this more limited and specific bill.

Mr. McCLORY. Do you think that there is—do you attach such importance to the utilization of the expression "reason to know" as opposed to the word "know" alone to be such that the legislation is faulty?

Mr. KEUCH. I'm sorry, sir, the fact that it is——

Mr. McCLORY. You stated that you would consider it difficult to prove a case where you—or that you would question the validity of our bill where we use the expression "reason to know." You referred to scienter—that you would have to know. It wouldn't be sufficient if a person had reason to know that his disclosure would impair or impede the intelligence capabilities of the United States.

Mr. KEUCH. I'm sorry sir. May I give you a better response to that, a written response?

I apologize.

Mr. McCLORY. Well, let me ask you this. In response to the question by the gentleman from Massachusetts, you said that you had doubts as to the constitutionality of portions of this legislation, I guess 501 (b).

What I would like you to do is to furnish us with a letter advising as to the constitutionality or nonconstitutionality of that provision or any other provision, because we don't want to proceed in any unconstitutional way. But I think that if you are questioning constitutionality, I would like you to back it up by an opinion. (See appendix A.)

Mr. KEUCH. Yes, sir, and I think I would like to make it clear that what we say—and we believe the specific intent requirement, which I think was an addition after discussions between the staff and the Department or at least was an evolution of the House bill, goes a long way toward solving constitutional questions as to the facial applicability of the statute—but our concern in the constitutional area is primarily just as I indicated, that is, the chilling effect it may have on honest and sincere criticism of our intelligence operations.

Mr. McCLORY. Do you not believe that personnel who are working for or formerly worked for the FBI should be covered equally with the CIA?

Mr. KEUCH. Yes, sir, I do; and I think that was an unfortunate oversight. I have talked to the FBI about that, and I think certainly

in those operations which, under the Executive order on intelligence activities, the FBI is permitted to conduct overseas, it should be covered as this coverage goes to other agencies, certainly.

Mr. McCLORY. In the earlier statement by Mr. Carlucci, he referred to Mr. Civiletti's statement that revealing the identities of particular intelligence personnel and placing them in danger serves no legitimate purpose. Our proper concern for individual liberties must be balanced with a concern for the safety of those who serve the Nation in difficult times and under dangerous conditions.

Has anything changed since he made that statement, or do you support that statement now?

Mr. KEUCH. I certainly do.

Mr. MAZZOLI. The gentleman's time has expired.

The gentleman from Georgia, Mr. Fowler, is recognized for 5 minutes.

Mr. FOWLER. The Justice Department, Mr. Keuch, did it not support our graymail legislation that we marked up yesterday?

Mr. KEUCH. I'm sorry, sir, did not or did?

Mr. FOWLER. It did.

Mr. KEUCH. Yes, sir, yes, indeed; enthusiastically as I recall.

Mr. FOWLER. In your statement, on pages 7 and 8, you note that "the intent element will facilitate 'graymail' efforts by a defendant."

Now, I think we all agree that under any intent standard, that would be, being subjective, that would be a jury question, would it not?

Mr. KEUCH. Yes, sir.

Mr. FOWLER. I can't—help me out here. I can't quite see how any information provided by the Government as to actual CIA operations would be useful to disprove a defendant's subjective intent. In other words, if a defendant claims that he made a certain disclosure because he thought the CIA was promoting bad policy in a certain country, that would be to his defense on the issue of intent, but why would what the CIA be doing or not doing in any place be relevant to intent?

Mr. KEUCH. I don't think it is a question of disproving his intent from our point of view. It would not be the primary concern. It would be that the individual could well argue that his overall intent or his purpose—and what we are talking about is motive and purpose in this situation—is to improve our intelligence agencies. And one example I can quickly think of, and I am sure there are many others, if he had disclosed a series of assets or covert agents in, say, Portugal, which was a country raised this morning, he might argue that the fact that we operated such assets and that we used those activities had, in fact, had an egregious diplomatic foreign affairs impact on our ability to conduct other intelligence programs in Portugal. And he would be arguing, saying, Look, I am trying to say that is a particular—and maybe, perhaps, we could just say country X, rather, because I don't know the situation in Portugal—but that is a situation where we would have been benefited if we had not used this type of activity of covert agents. We should not have used this class of individual as covert agents, and to prove that, to establish that, Mr. Government and Mr. Court, I need information to show what the effectiveness of our intelligence programs was both before and after I made these disclosures—what they were before and after we used this type of asset

and informant; I would like to know what diplomatic objections or so on had been made.

Mr. FOWLER. That's a good argument, that's a good defense, but it seems to me that is irrelevant to the question of his intent to disclose. He is just arguing the reasons for his disclosure, not the impact of the disclosure.

Mr. KEUCH. That's correct, but his reasons are to improve intelligence capabilities, and he says this to prove that he was doing that.

Mr. FOWLER. But that's the element of scienter.

Mr. KEUCH. Well, but he is going to say——

Mr. FOWLER. I don't care what he is going to say. He can say anything he wants to. That is the defense. That is irrelevant, would not you say, as a lawyer, to the issue of scienter?

Mr. KEUCH. Sir, I might make that argument. I would certainly try to defend against it on relevancy grounds, but I think it is very likely the court would rule that the defendant has a right to explore the effectiveness of those programs, to explore the adverse impact they may have had, and so forth, to support his argument, his argument that his intent, as shown by the objective record, was to improve our intelligence operations rather than harm them, and that is our concern.

Mr. FOWLER. So what you are asking us to do to insure not only effectiveness but the constitutionality of legislation is to eliminate our section 2 of the bill, based on basically the discussion that we have had this morning, and substitute yours. Is that correct?

Mr. KEUCH. Yes, sir.

Mr. FOWLER. Suppose we adopt your section 801, which would prohibit the knowing disclosure of information correctly identifying covert agents by any person acting with the knowledge that the disclosure is based on classified information, and that person is a journalist, wherever he was. Is that going to change your policy toward prosecuting journalists?

Mr. KEUCH. It seems to me that if he acts consistent with the standards of the bill, that is, with knowledge that it comes from classified information, our position today is that the journalists today are as subject as any other American citizens to the Criminal Code. There would certainly be no difference in their being subject to the code in this circumstance.

Mr. FOWLER. Would that get us back into the sources debate if—I have forgotten, what is the law now, after all the cases, on whether or not a journalist has to reveal his sources?

Mr. KEUCH. I think the law generally is no, absent some overwhelming—I think there is a hearing and showing that first amendment issues are fully litigated and the rest, but I think there are two protections here, and one is the fact that first, it comes from classified information, and the other is that the definition and the coverage of the bill, the definition of covert agents, which is the information that is being covered in the bill, it is very limited.

Mr. FOWLER. You are talking faster than I can think.

Mr. KEUCH. Sorry. I may be talking faster than I can think. That may be the problem.

Mr. FOWLER. I thought because of my background I might say it politely.

The question is, you have got to prove that he knowingly disclosed this classified information. Now, he comes to you, he writes the column and says this and that, and it is classified information, and you go after him.

Now, how are you going to find out where he got it and whether or not he knew it was classified?

Mr. KEUCH. Well, that is exactly the problem we have under the leak issues we have discussed with this committee so many times in the past. It is a question of proof. But if we could pass statutes that would absolve our need to find appropriate proof and meet other standards, of course, our job would be a lot easier.

If we cannot establish that he disclosed a covert agent—and what I was trying to say earlier was the definition of covert agent is some protection also in this statute and in the House bill because it is a cover status that has been maintained by the Federal Government. So if it has now become public knowledge and the Government has officially released it, and so forth, there wouldn't be that type of coverage, but if we can show that he took the information concerning the covert agent with knowledge that it came from classified sources, then we feel we would have a case.

And of course, with knowledge that it came from classified sources, just as his intent, would have to come from all the surrounding circumstances. But our belief is that those circumstances are objective and are based on factual matters rather than an analysis of the individual's motives, his previous statements or positions on the agency or intelligence operations——

Mr. FOWLER. Just one further question.

Mr. MAZZOLI. The gentleman's time has expired.

I will recognize myself and yield my time.

Mr. FOWLER. Thank you very much. I was going to give up my future time, but I just think we ought to hammer something down after we have sat here this far.

You heard our discussion this morning from Chairman Boland and myself about any legislation that would prosecute based on information, revelations derived from unclassified information, and I take it from your testimony that, simply and boldly put, any legislation that we would draw along that line would simply not stand any constitutional test.

Mr. KEUCH. I think without the other narrowing effects of the bill, I think that is correct, sir, and of course, we feel that the Department's draft in that area is limited to a narrow class, that is, former employees and agents, and so forth, as the House bill is, too, and again, here again the definition of covert agent is some protection. So the individual who did have access to this information under a condition of trust, who knows that the information revealed reveals a covert agent, even though it does not come from classified sources, he uses the expertise, the knowledge, the "Rosetta stone," if you will, of his experience, we believe that we can constitutionally reach that individual. But if the U.S. Government has already made the identity of the agent public, other than by the fact that once he uses the "stone" of his experience to make that determination from otherwise public sources—I don't mean that but I mean some public disclosure—that would not be reached.

Mr. FOWLER. Thank you.

Mr. MAZZOLI. Mr. Keuch, let me ask you one time again because I may be a little bit thickheaded this morning, is the Department of Justice behind new legislation in this field of identity of covert agents?

Mr. KEUCH. Yes, sir.

Mr. MAZZOLI. Let me ask you for just a moment, in an area in which you have been questioned already this morning, and that is this additional standard of classified data, that in the terms of the person who receives information in an authorized form and who then later in unauthorized form reveals it, that is a crime so long as the information is based on classified data.

Am I correct or incorrect?

Mr. KEUCH. No, sir. If the individual received it under 802 of our bill, if the individual has received it in a position of trust, he has received it because of his prior position, and he discloses information which identifies a covert agent, he is guilty of a crime whether or not that information comes from classified sources or unclassified sources.

Now, there is the protection, as I have just indicated in the last answer, that the covert agent must be—that covert status must have been maintained by the Government.

Eight hundred and two of the bill, for example, says, whoever, either having been an employee, et cetera, with access to information, knowingly discloses information that correctly identifies another person as a covert agent, or attempts to do so, is guilty of an offense. That has no requirement, unlike section 801 of our bill, that it comes from classified information.

Mr. MAZZOLI. Well, now, is 801 comparable to our 501(a)?

Mr. KEUCH. Yes, sir, I think the two are fairly comparable.

Mr. MAZZOLI. Well, then, you do add classified information.

As I understand our 501(a), it does not have to be classified information or information based on classified data, is that correct as you understand it?

Mr. KEUCH. Yes, sir, except that under 501(a)(i), the identity of the officer, employee, or member is classified information, which I think is comparable to our definition of covert agent.

Mr. MAZZOLI. Well, it may be, and of course, unfortunately you just served as with this bill today so we really haven't had a chance to get into it carefully, which we shall in the days to come; but if I read 801, you are adding a very important element of proof for the Government, and that is that the disclosure, which is unauthorized, has to be based on classified information, not that the name has been classified or the identity is being blown, but that that knowledge has come from classified information.

I earlier asked you today about the person who hears information at the water fountain, or a person who gets a piece of paper across his desk without a classified stamp which does blow an identity cover, because it concerns me. That kind of information, under our 501, would indeed be enough to amout to a criminal offense. Under your bill it would not, if I understand correctly, because that would not be classified information or information based on classified information.

Mr. KEUCH. Except the only problem with that, sir, as we were discussing, the section of our bill that imposes that is one that applies to anyone, and the individual who has paper coming across his desk as a result of his official position or his employment with the agency would come under section 802 of the bill, which only provides that the individual having had that type of access discloses a covert agent. There is no requirement in 802 that that came from classified information.

Mr. MAZZOLI. I thank you for your time. Are there any follow-up questions?

The gentleman from Illinois?

Mr. MCCLORY. Are there any cases that you have now in litigation, under the existing law, against persons that have violated the existing law?

Mr. KEUCH. Well, sir, I can certainly state that we have no cases under litigation, that is in the public courts and the rest.

As to the response to the rest of the question, I think I would like to answer that in executive session. I certainly would be glad to. I think I have on other occasions.

Mr. MCCLORY. Now, what about people that you know, should know have possession of classified material that they have received in an unauthorized way? Are we doing anything about trying to get those back through litigation or——

Mr. KEUCH. Again, I hate to respond in the same way, I am sorry I have to, but I would like to discuss those in executive session of the committee.

Mr. MCCLORY. Well, there is nothing pending. If it was pending, it would be public knowledge.

Mr. KEUCH. There is nothing pending in the court, sir, I will say that. That is correct.

Mr. MCCLORY. Let me ask you this. If we enact this legislation, either in the form that the committee wants it or that the CIA wants it, or the form you want it or however, are you going to use the legislation to prosecute offenders?

Mr. KEUCH. Of course, the answer to that has to be yes, but if what you mean is will the passage of this legislation result in a spate of indictments, I am sorry, but I think that all the discussions we have had in the past concerning our problems in this area, in leak cases, classic espionage cases and the rest, are still going to apply. Certainly our burdens will be changed, there will be new considerations, and as I have tried to say, the Department supports this legislation, we think it is an important area to act in. We think that the actions that have been taken in the past in disclosing agents are reprehensible, and I think the language used this morning was not too strong. But I certainly can't sit before you and say that if the legislation is passed, that we will then turn around and render a number of indictments. But certainly we will vigorously enforce the law.

Mr. MCCLORY. Well, this subcommittee yesterday had a markup session of the so-called graymail bill, and we are intending to move that ahead, even ahead of this bill. But you want that bill, don't you?

Mr. KEUCH. Yes, sir.

Mr. MCCLORY. And you intend to utilize it if we enact it?

Mr. KEUCH. Yes, sir, and that bill may, we hope, and it is designed to, and as we supported it and urged its passage to avoid some of the problems that I have indicated exist in this area.

Mr. MCCLORY. And that bill, coupled with this bill, could be both useful in connection with prosecutions, couldn't it?

Mr. KEUCH. Absolutely, yes, sir.

Mr. MCCLORY. And you want both pieces of legislation?

Mr. KEUCH. Yes, sir.

Mr. MCCLORY. And you will utilize them?

Mr. KEUCH. Yes, sir.

Mr. MCCLORY. Thank you.

Mr. MAZZOLI. The gentleman's time has expired.

The gentleman from Georgia is recognized for five additional minutes.

Mr. FOWLER. Thank you, Mr. Chairman.

Is this—in the intent standard, isn't that basically the same as the criminal standard in the Atomic Energy Act?

Mr. KEUCH. I don't believe so, sir. I think the—I am embarrassed. I am very familiar with the title 18 espionage statutes but—

Mr. FOWLER. Well, I couldn't quote it either.

Well, let me just ask you, without taking up my time, I have got it here, and I think it is.

Mr. KEUCH. All right.

Mr. FOWLER. So I would like to know how the intent element is handled in prosecutions under the Atomic Energy Act.

Mr. KEUCH. Certainly.

Is that 4122, sir, or what is the number?

Mr. FOWLER. 2274.

To follow up on Mr. McClory's question, our impression, rightly or wrongly, is that the policy of the Justice Department has been one of reticence toward the prosecution of journalists who knowingly publish classified information, and the previous position of the Justice Department was that the conspiracy and disclosure laws of the country were adequate.

Now, I guess we are all applauding the change, that you had found that they were not adequate or you wouldn't be asking for this legislation, your own version of the legislation. I wish you would speak to the fact of whether or not, if we enact such legislation, if we will see a change in the Department's policy to prosecute whatever violations are found.

Mr. KEUCH. Well, it is a simple answer, and I know that it is one that we have discussed before this committee at great length, so I would say the simple answer is that, as I have indicated earlier, we certainly believe that there is no segment of the society, whether it be the executive branch, the judicial branch, or our friends in the fourth estate, who are above the law, and we would apply the statutes to those individuals. One of the reasons we think that the Department of Justice's version of this bill at least, or within this effort is an effort that should be taken, is that it does narrow down the applicability of some of the present statutes. So it may remove some of the policy issues and questions that arise when you attempt to apply the broader espionage

statutes to the leak area, whether that leak is of covert action or covert agents, or of some other intelligence operation.

But the problems that exist in investigating, in prosecuting individuals who speak in our public fora for espionage cases is a principal problem we are going to have to live with under whatever statute we pass, and I think it is a balance and a problem that has to be faced most carefully.

I cannot say that there will be a change in the prosecutive attitude of the Department of Justice with the passage of this legislation because I believe that we now have the attitude that we will prosecute for violations of the statute where it is appropriate and where those violations are clear and a criminal law has been violated, if we can get the necessary evidence.

Mr. FOWLER. Let me conclude by asking you to submit, along those lines, your reaction to the comments of Mr. Abrams.

Mr. KEUCH. All right, fine, sir.

Mr. FOWLER. Second, we would like to have in writing what you construe to be the meaning of the phrase "based on classified information" in your version of the bill.

And last, any elaboration of your statement about the chilling effect on the general speech of our section 501(b), whether or not you want to say that again, blatantly, what I think you are going to say, that you believe that is unconstitutional. (See appendix A.)

Mr. MAZZOLI. Thank you very much.

The gentleman from Massachusetts for the final, followup questions?

Mr. BOLAND. Mr. Chairman, I just want to compliment Mr. Keuch for his appearance here today. He has thoughtfully discussed some of the problems that we may have in the bill and questions that we have with respect to it, and that is the very purpose of these hearings. And I would hope that if we get an identities bill passed, that the Justice Department would believe that the Congress is concerned about this matter, and that the Justice Department ought to share that concern.

Thank you very much.

Mr. MAZZOLI. I thank the gentleman, I thank Mr. Keuch, and we appreciate your help this morning.

And for the final witness on the morning hour, we would welcome Mr. Floyd Abrams, who is considered one of the eminent authorities on the first amendment in the United States.

Mr. Abrams is a partner in the firm of Cahill, Gordon & Reindel. Ho teaches at the Yale Law School a course entitled "The First Amendment and the Media," and is chairman of the Committee on Freedom of Expression of the Litigation Section of the ABA.

Mr. Abrams was cocounsel to the New York Times in the Pentagon Papers Case, and was counsel to Random House in connection with litigation arising out of the publication of material by Victor Marchetti and Frank Snepp.

Mr. Abrams has argued in the Supreme Court on behalf of the press in several cases, including *Herbert* v. *Lando*, *Nixon* v. *Warner Communications*, *Nebraska Press Association* v. *Stuart*, and *Landmark Communications* v. *Virginia*.

Mr. Abrams, you are welcome and we appreciate your help.

STATEMENT OF FLOYD ABRAMS, ESQ., COMMUNICATIONS COUNSEL; CHAIRMAN, COMMITTEE ON FREEDOM OF EXPRESSION OF THE LITIGATION SECTION OF THE AMERICAN BAR ASSOCIATION

Mr. ABRAMS. Thank you.

Mr. Chairman and members of the committee, I am honored by your invitation to appear today and to testify with respect to H.R. 5615. I will also comment briefly on H.R. 3357, the legislation introduced by the majority leader as to which he testified this morning.

I wish to emphasize, if I may, at the outset that I appear and speak on my own behalf today and not on behalf of any clients with whom I may sometimes have become associated.

That being said, I think it is useful and appropriate for me to advise the committee at the outset as to the personal framework within which I approach any review of H.R. 5615.

My own view is that the naming or listing of undercover intelligence officers, agents, informants and sources by any of their colleagues is an outrage; and that those who have engaged in such activities have disgraced themselves and disserved both their colleagues and their country. I appear as one who believes that covert intelligence operations, within proper bounds, constitute one useful and significant function of any intelligence service. And I appear as one who believes, as I am sure every member of this committee believes, that in considering legislation in this delicate area, it is essential to adhere to the commands of the first amendment; that legislation threatening to any degree, freedom of expression must be narrowly and not broadly drafted; that in areas of doubt, we must take the risks of freedom and not of repression; and that as Supreme Court Justice Potter Stewart has said: "So far as the Constitution goes, the autonomous press may publish what it knows, and may seek to learn what it can."

All that being said, I appear before you for the primary purpose of urging upon you that section 501(b) of the proposed legislation is flatly and facially unconstitutional; that it is, as well, unwise; and that, on reflection, it should be rejected. And I appear to urge that section 501(a) is, as now drafted, of extremely dubious constitutionality, but that the heart of what I understand section 501(a) seeks to accomplish can, I believe, be constitutionally accomplished.

Now, as the committee is well aware, and as all the witnesses this morning have indicated, the proposed legislation deals with two separate categories of individuals. The first are those who have or have had authorized access to classified information. The second relates to all others. I will direct the major thrust of my remarks to the second category, section 501(b), although I will offer a few suggestions at the conclusion of my statement about the first.

On its face, section 501(b) would permit the criminal prosecution of any newspaper, broadcaster, publisher, author, journalist, or any other citizen who in any way, and however innocently, learns the name or other facts concerning the identity of any agent, informant or the like, that the United States is attempting to keep secret, and publishes or otherwise discloses it. That person and those entities, under section 501(b), may be charged with a felony and sentenced to 1 year in prison, or fined $5,000, so long as a jury finds that such disclosure has been

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made, and that the intention or purpose of the disclosure was "to impair or impede the foreign intelligence gathering operation of the United States."

The effect of such a statute would be startling and unprecedented. Under its terms, when Francis Gary Powers was captured by the Russians for overflying their airspace in a U–2, every publication in the United States that published Mr. Powers' name would have been subject to criminal prosecution under the statute until the executive branch of the United States had publicly acknowledged or revealed the intelligence relationship to the United States of Mr. Powers. Such prosecution would have been possible, notwithstanding the fact that Powers' name was widely, indeed internationally known; that the Russians had themselves revealed Mr. Powers' capture, and that, indeed, Mr. Powers was then facing charges in the Soviet Union. It is true that under the statute, all who mentioned Powers' name could have defended on the ground that they did not "intend" to "impair or impede" the foreign intelligence activities of the United States. But the effect of this would simply have been to permit different results as to different individuals who had done precisely the same thing, to disclose what had already been disclosed.

I would go further. Subject to its exceptions, the statute would not only have made it a crime for the news media to disclose Mr. Powers' name, but for each and every American who read it or heard it to repeat the name. Under the statute, no matter how often the name had been heard or reheard, no matter how well known an individual was, each individual who mentioned the name would have been subject to criminal liability, subject, of course, to the intent provision of the statute.

Let me offer another, earlier, example. In 1958, another American pilot, while flying for the CIA, was shot down, this time in Indonesia. According to the book "The Invisible Government" written by David Wise and Thomas Ross, the pilot, Allen Pope, was initially held by the Indonesian authorities; he was then publicly tried for the murder of civilians and sentenced to capital punishment. In 1962, 2 years later, he was released. Under proposed section 501(b), the authors of The Invisible Government, the publisher of the book, and each and every reader of it who repeated Pope's name would have risked criminal prosecution.

And I would note here, and I think it is relevant in light of the discussion this morning as to the intent provision of 501(b), that the Central Intelligence Agency was extremely unhappy about the publication of the book The Invisible Government, a book which was widely and favorably reviewed in the Nation's press. It is precisely in cases such as this that the "intent" exception of the statute is of least assistance to a prospective publisher. It is one thing to say that a publisher which in fact did not intend to impair or impede the foreign intelligence activities of the United States should be acquitted of a crime. I am confident in this case it would have been. It is quite another to say that the CIA at the time The Invisible Government was published would not have sought prosecution, if it could have done so, or that it would not seek to do so if a similar situation were to recur.

One could cite many other examples of material which I believe should have and should be published, and as to which publication